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# REVISION OF THE LAW OF SEX CRIMES IN PENNSYLVANIA AND NEW JERSEY

## INTRODUCTION

In May of 1962 the American Law Institute released its comprehensive final draft of the *Model Penal Code*.<sup>1</sup> Since that time a number of state legislatures have adopted provisions of the Code.<sup>2</sup> Pennsylvania has recently enacted its new *Crimes Code*<sup>3</sup> and New Jersey has drafted a new penal code<sup>4</sup> that would, if passed, significantly alter its criminal law. Each of these codifications is designed to remedy the multitude of inconsistencies and injustices that have developed in the law as a result of long histories of piecemeal additions and the changing legal and societal climate.

One of the areas that best illustrated the need for reform was the law relating to sexual offenses where rapidly changing moral standards of the community had rendered the existing law obsolete. It is the purpose of this Comment to examine and compare the Pennsylvania and New Jersey codes as they deal with sexual offenses. The deficiencies in the old law of Pennsylvania and the existing law of New Jersey, as well as their respective legislatures' attempts to remedy them, will be analyzed. In connection with Pennsylvania law, this Comment will also examine the Pennsylvania Bar Association proposal<sup>5</sup> from which the new *Crimes Code* evolved and which in several respects more effectively dealt with the problems that are present in this area. Each code's specific successes and failures will be evaluated with respect to their goal of establishing a well-defined, effective, and cohesive legal system.

The scope of this Comment will be limited to the following sex-related crimes: rape, sodomy (or deviate sexual intercourse), seduction, corruption of minors, and sexual assault.

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1. MODEL PENAL CODE (Proposed Official Draft, 1962).

2. See, e.g., ILL. ANN. STAT. ch. 38 (Smith-Hurd 1972); N.Y. PENAL LAW (McKinney 1967); ORE. REV. STAT. tit. 16 (1971).

3. PA. STAT. ANN. tit. 18 (Supp. 1973).

4. N.J. CRIMINAL LAW REVISION COMM'N., FINAL REPORT ON N.J. PENAL CODE, Vol. 1 (Oct. 1971) [hereinafter cited as N.J. PROPOSED CODE].

5. PA. B. ASS'N SPECIAL COMM. ON CRIME AND JUVENILE DELINQUENCY, PROPOSED CHANGES IN THE CRIMINAL LAW OF PA. (Jan. 1971) [hereinafter cited as P.B.A. PROPOSED CODE].

I. THE MEANING OF THE PENNSYLVANIA CRIMES CODE—  
RAPE AND RELATED OFFENSES

A. *Former Rape Law in Pennsylvania*

**Forcible Rape:** The first element required under the old statute<sup>6</sup> was that the actor have "unlawful carnal knowledge of [the] woman."<sup>7</sup> This had been interpreted to require penetration, however slight, by the male sexual organ into the vagina of the female.<sup>8</sup> Although the statute did not explicitly exclude the situation where a woman was forced to submit to sexual intercourse by her husband, this could be implied from the use of the adjective "unlawful."<sup>9</sup> Furthermore, since the statute was worded in terms of male aggression, it was assumed that a female could not commit rape of a male. Since it was the violation of the female's body that was the gist of the offense and not the sexual gratification of the male at her expense, carnal knowledge had been interpreted not to require emission.<sup>10</sup>

The other element of rape specified in the statute was that the act be committed forcibly and against the will of the female.<sup>11</sup> The requisite force need not have been actually applied, but may have been constructive or implied.<sup>12</sup> Thus, if the victim were asleep or mentally unconscious from intoxication or the use of drugs, whether or not this condition was caused by the actor, the act of sexual intercourse had generally been found to constitute rape.<sup>13</sup> Indeed, the courts had held that the act was against the victim's will "when from *any cause* she was not in a position to exercise any judgment about the matter."<sup>14</sup> Thus, sexual intercourse with a female who was so unsound of mind as to be unable to give rational legal consent had been found in Pennsylvania to constitute rape when the actor knew of her incompetency,<sup>15</sup> even though the actor used no more force than was required for commission of

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6. Act of May 12, 1966, No. 1, § 1, [1966] Pa. Laws 84 (repealed 1972).

7. *Id.*

8. *E.g.*, Commonwealth v. Green, 210 Pa. Super. 482, 484, 233 A.2d 921, 923 (1967); Commonwealth v. Moon, 151 Pa. Super. 555, 561, 30 A.2d 704, 708 (1943).

9. Act of May 12, 1966, No. 1, § 1, [1966] Pa. Laws 84 (repealed 1972).

10. *E.g.*, Commonwealth v. Green, 210 Pa. Super. 482, 484, 233 A.2d 921, 923 (1967); Commonwealth v. Moon, 151 Pa. Super. 555, 561, 30 A.2d 704, 708 (1943).

11. Act of May 12, 1966, No. 1, § 1, [1966] Pa. Laws 84 (repealed 1972).

12. *E.g.*, Commonwealth v. Stephens, 145 Pa. Super. 394, 399, 17 A.2d 919, 921 (1941).

13. *Id.* at 398, 17 A.2d at 920.

14. *Id.* (emphasis added). This formulation poses a number of problems. See notes 55-57 and accompanying text *infra*.

15. *E.g.*, Commonwealth v. Brown, 184 Pa. Super. 494, 498, 136 A.2d 138, 140 (1957); Commonwealth v. Stephens, 143 Pa. Super. 394, 399, 17 A.2d 919, 921 (1941).

the carnal act and the woman offered no resistance at all.<sup>16</sup> When the victim did not fall within this category, the degree of resistance required to be manifested by her in order to prove her requisite lack of consent was relative and depended upon the circumstances of her situation.<sup>17</sup> One of these circumstances was the degree of force manifested by the actor. In this regard, a *threat* of force, when serious bodily harm was threatened, had been held to be sufficient to make out the offense<sup>18</sup> and in at least one instance a threat of suicide made by the defendant, coupled with lesser threats directed against member of the victim's family had been found to be sufficient.<sup>19</sup>

Problems arose under the old statute concerning the fraudulent procurement of consent. Although there were very few cases that dealt with this issue, generally the courts had found the act not to have been rape.<sup>20</sup> The question most commonly arises in connection with one of two different factual situations. The first is the "mistaken husband" situation in which the female consents to sexual intercourse under the mistaken belief that the actor is her husband, either because of the staging of a "sham marriage" or because she finds him in her bed and assumes he is her husband.<sup>21</sup> The other type of situation arises from the doctor-patient relationship and falls into either of two sub-classifications. In one situation the victim actually consents to the act of sexual intercourse, having been led to believe that she must submit to it as necessary treatment. In the other, the doctor obtains the consent of the victim under the misrepresentation that he must make an examination or perform an operation but which, unknown to the victim at the time, subsequently turns out to be sexual intercourse. Although no cases were found in Pennsylvania, neither situation

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16. *Commonwealth v. Stephens*, 143 Pa. Super. 394, 399, 17 A.2d 919, 921 (1941).

17. *Commonwealth v. Steele*, 75 Dauph. Co. 241, 246 (Pa. O.&T. 1960):

As to the degree of resistance which will exclude the conclusion or inference that the female gave her consent it is generally held that she need only make such resistance to the force of the defendant as seem reasonable to offer under the circumstances, such as the relative strength of the parties, the age and condition of the female, and uselessness of resistance and the degree of force manifested.

18. *Id.*

19. *Commonwealth v. Kling*, 20 Bucks Co. 398 (Pa. C.P. 1970). In this case, however, the defendant was the victim's father. The threat of suicide, therefore, may be presumed to have been more compelling than a similar threat from a stranger would have been.

20. *Commonwealth v. Childs*, 2 Pitts. 391, 394 (Pa. O.&T. 1863).

21. *Commonwealth v. Duchnicz*, 42 Pa. County Ct. 651 (Lack. O.&T. 1914).

would seem to fall within the purview of the statute. In the former situation, the female actually consents to the act of sexual intercourse so that the intercourse can not realistically be said to be "against her will." In the latter situation, there is still lacking the requisite element of force on the actor's part or incapacity on the victim's part.

Under the old statute, if serious bodily injury resulted from the commission of the offense, upon conviction a first offender could be sentenced to a minimum of fifteen years and a maximum of life.<sup>22</sup> Otherwise, the offense carried a maximum of twenty years.<sup>23</sup> A conviction could be sustained on the uncorroborated testimony of the victim.<sup>24</sup>

*Statutory Rape:* Contrary to forcible rape, statutory rape required neither lack of consent by the victim nor manifestation of force by the actor.<sup>25</sup> The statute only required that the male be sixteen years of age or older, that he have sexual intercourse<sup>26</sup> with a female, and that the female be less than sixteen years old and of good repute.<sup>27</sup> With respect to this last element, the Pennsylvania courts had adopted the unusual interpretation that good repute was determined by the female's general *reputation* for chastity in the community in which she lived, at or about the time of the offense, and *not* by whether or not she was chaste in fact.<sup>28</sup>

Statutory rape was a felony and upon conviction the defendant could be sentenced to a maximum term of fifteen years impris-

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22. Act of May 12, 1966, No. 1, § 1, [1966] Pa. Laws 84 (repealed 1972).

23. *Id.* The sex offender may be sentenced alternatively under PA. STAT. ANN. tit. 19, §§ 1166-1174 (1964) which provides:

For the better administration of justice and the more efficient punishment, treatment and rehabilitation of persons convicted of the crime of indecent assault, incest, assault with intent to commit sodomy, solicitation to commit sodomy, sodomy, assault with intent to ravish or rape, if the court is of the opinion that any such person, if at large constitutes a threat of bodily harm to members of the public, or is an habitual offender and mentally ill, the court in lieu of the sentence now provided by law, for each such crime, may sentence such person to a State institution for an indeterminate term having a minimum of one day and a maximum of his natural life.

24. *E.g.*, Commonwealth v. Lytes, 209 Pa. Super. 436, 439, 228 A.2d 927, 929 (1967); Commonwealth v. Ebert, 146 Pa. Super. 362, 363, 22 A.2d 610 (1941).

25. Act of May 12, 1966, No. 1, § 1, [1966] Pa. Laws 84 (repealed 1972).

26. The terminology used in the statute was "unlawfully carnally knows and abuses." *Id.* This had been held to require penetration, although emission was unnecessary. *E.g.*, Commonwealth v. Exler, 61 Pa. Super. 423, 433, 89 A. 968, 974 (1915).

27. Act of May 12, 1966, No. 1, § 1, [1966] Pa. Laws 84 (repealed 1972).

28. Commonwealth v. Sutton, 171 Pa. Super. 105, 108, 90 A.2d 264, 265 (1952); Commonwealth v. Calvery, 130 Pa. Super. 575, 576, 198 A. 450 (1938); Commonwealth v. San Juan, 129 Pa. Super. 179, 185, 195 A. 433, 436 (1938).

onment.<sup>29</sup> In a prosecution for statutory rape, it was no defense that the defendant was mistaken as to the female's age<sup>30</sup> and a conviction could be sustained solely upon the uncorroborated testimony of the victim.<sup>31</sup>

### B. Rape Under the Pennsylvania Crimes Code

The *Pennsylvania Crimes Code* presents an amalgam of prior law (judicial and statutory), the *Model Penal Code*, and the *P.B.A. Proposed Code*. With the focus on the present law, a discussion of both prior law and these other proposals is necessary to edify the changes and deficiencies in the new code.

The *Crimes Code* retains the old statutory format which divided the offense into the two separate provisions of Rape and Statutory Rape.<sup>32</sup> The new law, however, uses more explicit terminology in defining the crimes. First, the *Crimes Code* provides that rape is not committed unless the victim is a "person not the spouse of the actor,"<sup>33</sup> thus clarifying the ambiguity in the old law.<sup>34</sup> Secondly, the archaic "unlawful carnal knowledge" is discarded in favor of the term "sexual intercourse."<sup>35</sup> More important than the adoption of this more descriptive term, however, is the new law's broadening of the term sexual intercourse to include, in addition to its ordinary meaning, intercourse per os or per anus.<sup>36</sup> The *Crimes Code* retains the old law's construction as to penetration and emission.<sup>37</sup> The crime is not specifically limited to males,

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29. Act of May 12, 1966, No. 1, § 1, [1966] Pa. Laws 84 (repealed 1972). But see note 23 *supra*.

30. Act of May 12, 1966, No. 1, § 1, [1966] Pa. Laws 84 (repealed 1972).

31. E.g., *Commonwealth v. Ebert*, 146 Pa. Super. 362, 363, 22 A.2d 610 (1941).

32. PA. STAT. ANN. tit. 18, §§ 3121-22 (Supp. 1973). Section 3121 provides:

A person commits a felony of the first degree when he engages in sexual intercourse with another person not his spouse:

- (1) by forcible compulsion;
- (2) by threat of forcible compulsion that would prevent resistance by a person of reasonable resolution;
- (3) who is unconscious; or
- (4) who is so mentally deranged or deficient that such person is incapable of consent.

33. The definition of spouse is broadened in the *Crimes Code* to include a woman who is living with a man as his wife, regardless of the legal status of their relationship. PA. STAT. ANN. tit. 18, § 3103 (Supp. 1973).

34. See note 9 and accompanying text *supra*.

35. See note 32 *supra*.

36. PA. STAT. ANN. tit. 18, § 3101 (Supp. 1973).

37. *Id.* See notes 8-10 and accompanying text *supra*.

however, and therefore suffers from the same vagueness as the old statute.<sup>38</sup> The *P.B.A. Proposed Code* corrected this by restricting the crime exclusively to males.<sup>39</sup>

Aside from the use of more meaningful general terminology, the new statute overhauls the old law by specifically enumerating the contingencies that will suffice to make out the offense.<sup>40</sup> The *Crimes Code* retains the old law's concept of forcible compulsion, but nevertheless avoids and clarifies the troublesome phrase "forcibly and against her will," which required reference to the correlative concepts of force and lack of consent. The second subsection of the rape provision<sup>41</sup> deals with the threats under which sexual intercourse will be considered rape. By thus including these situations within rape, the *Crimes Code* corresponds to the old law by not requiring an actual application of force and by not requiring resistance "to the utmost."<sup>42</sup> The new law, however, does not state specifically what threats will be sufficient. Rather it provides an objective standard which the courts will have to apply on a case-by-case basis.<sup>43</sup> This is essentially what the courts had been doing under the old statute.

It is submitted that the *P.B.A. Proposed Code* achieved a better result by specifically designating the threats under which sexual intercourse constituted rape.<sup>44</sup> In addition, the P.B.A. proposal provided that the threats might be directed against anyone, and therefore included the situation where the actor threatened the life of a member of the victim's family or her male escort.<sup>45</sup> The

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38. See notes 10 and 32 and accompanying text *supra*.

39. P.B.A. PROPOSED CODE § 1202(a) (1971):

A male, who has sexual intercourse with a female not his wife is guilty of rape if:

- (1) he compels her to submit by force or by threat of imminent death, serious bodily injury, or kidnapping, to be inflicted on anyone; or
- (2) he has substantially impaired her power to appraise or control her conduct by administering or employing without her knowledge drugs, intoxicants or other means for the purpose of preventing resistance; or
- (3) the female is unconscious; or
- (4) the female is less than fifteen (15) years old; or
- (5) he knows that she suffers from a mental disease or defect which renders her incapable of appraising the nature of her conduct.

Rape is a felony of the first degree if: (i) in the course thereof the actor inflicts serious bodily injury upon anyone; or (ii) the victim was not a voluntary social companion of the actor upon the occasion of the crime and had not previously permitted him sexual liberties.

In all other cases the offense is a felony of the second degree.

40. PA. STAT. ANN. tit. 18, § 3121 (Supp. 1973) (quoted in note 32 *supra*).

41. *Id.* § 3121(2).

42. See notes 11-19 and accompanying text *supra*.

43. PA. STAT. ANN. tit. 18, § 3121(2) (Supp. 1973) (quoted in note 32 *supra*).

44. P.B.A. PROPOSED CODE § 1202(a)(1) (1971) (quoted in note 39 *supra*).

45. *Id.* It is not clear whether the wording of the clause is intended

new law's lack of explicitness thus seems to have gained flexibility only at the expense of clarity and definiteness. Moreover, although the *Crimes Code*, because of its more general language, seems to reach a greater range of threats under its rape provision than did the P.B.A. proposal, this is in fact not so. The P.B.A. proposal established the lesser crime of Gross Sexual Imposition to reach those offenses which did not arise to the gravity of rape.<sup>46</sup> Among the situations encompassed by Gross Sexual Imposition in the *P.B.A. Proposed Code* was sexual intercourse under "any threat that would prevent resistance by a woman of reasonable resolution."<sup>47</sup> As such this provision reached those threats where compulsion did not overwhelm the will of the victim, but where she made "a deliberate choice to avoid some alternative evil."<sup>48</sup> Sexual intercourse under threats of the character included within this clause had not been held to constitute rape under the old statute. Similarly, because the *Crimes Code* did not adopt the format of the P.B.A. proposal, sexual intercourse under threats such as these which do not rise to sufficient gravity to be included within the new law's rape provision are excluded completely from serious criminal sanction.

Finally, by providing an *objective* standard to be employed by the courts in determining whether a threat is sufficiently serious so as to come within its rape provision, the new law seems ill-conceived. It is submitted that it is more desirable to adhere to a subjective standard because by so providing the actor would not be able to take advantage of the irrationality he himself had induced in the victim by his actions.

The third subsection of the *Crimes Code's* rape provision,<sup>49</sup> which condemns as rape sexual intercourse with unconscious females is simply a restatement of the old law.<sup>50</sup>

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to be so broad as to include a threat of suicide made by the actor. A literal reading would indicate that it is. But see MODEL PENAL CODE § 207.4, Comment at 247 (Tent. Draft No. 4, 1955).

46. P.B.A. PROPOSED CODE § 1202(b) (1971):

A male who has sexual intercourse with a female not his wife commits a felony of the third degree if:

- (1) he compels her to submit by any threat that would prevent resistance by a woman of reasonable resolution; or
- (2) he knows that she is unaware that a sexual act is being committed upon her or that she submits because she mistakenly supposes that he is her husband.

47. See note 46 *supra* (Subsection 1).

48. MODEL PENAL CODE § 207.4, Comment at 248 (Tent. Draft No. 4, 1955). A bargain for gain, however, was not within this clause. *Id.*

49. PA. STAT. ANN. tit. 18, § 3121(3) (Supp. 1973) (quoted in note 32 *supra*).

50. See note 13 and accompanying text *supra*.



The fourth subsection of the *Crimes Code's* rape provision includes as rape sexual intercourse with a person "who is so mentally deranged or deficient that such person is incapable of consent."<sup>51</sup> As such the new law retains the prior law's formulation of capacity in terms of legal consent.<sup>52</sup> The *Model Penal Code* rejected this type of approach: "Any formulation in terms of capacity to give legal consent is rejected here because it provides no meaningful guide to decision."<sup>53</sup>

Perhaps a more cogent argument against the "consent" standard than that advanced by the *Model Penal Code* is that, in most of these situations, the victim cannot realistically be said *not* to have consented to the act. In effect her conduct is volitional although it is unreasoned. It is precisely because the courts under the old law had recognized this that they, in order to make out the offense, had interpreted the old statute to require, not simply ordinary consent, but an abstract "legal" consent. They then proceeded to determine that the victim was incapable of giving this legal consent because of her condition.<sup>54</sup> By adopting this "consent" standard, the new *Crimes Code* forces the courts to make the same two-step fictionalization which was necessary to find rape under the prior statute.

A second difficulty with this subsection of the *Crimes Code* is that it does not specifically require that the actor know that the victim is suffering from such a mental condition at or before the time the offense is committed in order for the act to constitute rape. If this knowledge requirement is not "read into" the law by the courts, this subsection would represent a serious departure from prior law.<sup>55</sup> The *Crimes Code*, however, may make such knowledge a precondition to guilt by section 302, entitled "General Requirements of Culpability." This provision states that "a person is not guilty of an offense unless he acted intentionally, knowingly, recklessly or negligently as the law may require, with respect to each element of the offense."<sup>56</sup>

Finally, rape under the new code does not explicitly encompass situations in which the female is drugged or intoxicated because these conditions would not seem to fall within the terms "mentally deranged or deficient." Nevertheless, a person who administers such drugs or intoxicants to a victim with the intent of having sexual intercourse with her thereafter, judged by fundamental

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51. PA. STAT. ANN. tit. 18, § 3121(4) (Supp. 1973) (quoted in note 32 *supra*).

52. See notes 15-16 and accompanying text *supra*.

53. MODEL PENAL CODE § 207.4, Comment at 249-50 (Tent. Draft No. 4, 1955).

54. See, e.g., *Commonwealth v. Brown*, 184 Pa. Super. 494, 136 A.2d 138 (1957).

55. See notes 15-16 and accompanying text *supra*.

56. PA. STAT. ANN. tit. 18, § 302 (Supp. 1973).

principles of culpability, has certainly committed a wrong even more objectionable than if he had taken advantage of a pre-existing, independently induced condition such as mental illness. Furthermore, and assuming *arguendo* that its terminology is sufficiently broad to include this situation, the *Crimes Code*, nevertheless, does not eliminate the possibility of a defendant being convicted for rape where the victim *deprived herself* of her mental faculties, for example, by self-induced intoxication. The new law simply fails, as did the old law,<sup>57</sup> to distinguish active from passive wrongdoing and punish the conduct accordingly.

A far better proposal, it is submitted, was drafted by the Pennsylvania Bar Association in this area. The *P.B.A. Proposed Code* advanced two separate provisions to deal with these types of situations. The first of these stated that a male who had sexual intercourse with a female not his wife was guilty of rape if he had "substantially impaired her power to appraise or control her conduct by administering or employing without her knowledge drugs, intoxicants or other means for the purpose of preventing resistance."<sup>58</sup> By so providing, the P.B.A. proposal eliminated the troublesome "consent" standard in favor of a more desirable "control" standard. Moreover, in this manner the proposal specifically removed from its rape provision the situation in which the female had deprived herself of the power to appraise or control her conduct.

The second provision of the *P.B.A. Proposed Code* dealt with situations where the actor *knew* that the victim suffered "from a mental disease or defect which rendered her incapable of appraising the nature of her conduct."<sup>59</sup> Again the issue of "consent" is eliminated. Furthermore, the proposal obviated the necessity to resort to "general requirements of culpability" by specifically providing in the subsection itself that the male must know of the condition in the victim.

By having provided separately for (1) volitional<sup>60</sup> conduct on the victim's part which was the result of a condition purposefully induced in her by the male, and (2) volitional conduct occasioned by some cause other than the male's deliberate action, the P.B.A. proposal appeared to have recognized a distinction in the relative culpability of these two types of conduct. However, and notwith-

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57. See note 13 and accompanying text *supra*.

58. P.B.A. PROPOSED CODE § 1202(a) (2) (1971).

59. *Id.* § 1202(a) (5).

60. "Volitional" is used here in the sense of conscious acquiescence rather than legal consent.

standing the existence of the less severe crime of Gross Sexual Imposition established by it,<sup>61</sup> the *P.B.A. Proposed Code* nullified this distinction by imposing the same punishment for both situations under its rape provision.<sup>62</sup> By thus having failed to effectuate this distinction, the P.B.A. proposal ultimately disposed of these "mental-defect" situations in the same manner as the old law and the new *Crimes Code*, i.e. as rape.

Several other deficiencies in the *Crimes Code* result from its failure to provide for particular situations. Thus the new law makes no provision for the situations of fraudulently obtained consent described above.<sup>63</sup> Because the victim is in full possession of her faculties in the normal case of this kind, the "mental deficiency" subsection<sup>64</sup> would not apply. Consequently, the *Crimes Code* provides the courts no more guidance than did the old law in this area.

On the other hand, the *P.B.A. Proposed Code* effectively dealt with these situations. The second subsection of Gross Sexual Imposition provided that a male who had sexual intercourse with a female not his wife committed a felony of the third degree if "he knew that she was unaware that a sexual act was being committed upon her or that she submitted because she mistakenly supposed that he was her husband."<sup>65</sup> Thus the provision specifically reached the "mistaken husband" type of fraudulently obtained consent as well as the second variety of "doctor-patient" fraud where the female submitted to certain "treatment" that later turns out to be sexual intercourse. The other variety of "doctor-patient" fraud, characterized by the victim's consent to the act in fact, would not be reached by this clause. It would be encompassed, however, by the first subsection under Gross Sexual Imposition,<sup>66</sup> discussed previously,<sup>67</sup> if the doctor's representations to the victim concerning the consequences of her failure to submit reached the proportions of intimidation.

Another flaw in the rape provision of the *Crimes Code* is its failure to dispose of the situation in which the victim is *physically* helpless or powerless to resist the actor. In such a situation, nei-

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61. See notes 46-47 and accompanying text *supra*.

62. P.B.A. PROPOSED CODE § 1202(a) (1971) (quoted in note 39 *supra*). The behavior encompassed by Gross Sexual Imposition is closely related to that proscribed in the "mental defect" subsection of its rape provision. Each of the situations included in Gross Sexual Imposition is founded upon the somewhat less serious circumstance of a victim's pre-existing condition, short of unconsciousness, e.g., the victim's mistaken belief that the actor is her husband or her inability to perceive that sexual intercourse is not "necessary treatment." See notes 65-67 and accompanying text *infra*.

63. See notes 20-22 and accompanying text *supra*.

64. See note 51 and accompanying text *supra*.

65. P.B.A. PROPOSED CODE § 1202(b)(2) (1971) (quoted in note 46 *supra*).

66. *Id.* § 1202(b)(1).

67. See text accompanying notes 47-48 *supra*.

ther the "forcible compulsion" subsection, nor the "mental deficiency" subsection would seem to apply. On the other hand, any phrase condemning such conduct would have to be carefully drafted in order to avoid condemning as rape *any* intercourse with a female so disabled, whether or not she consented.<sup>68</sup>

The *Crimes Code* retains the old law's position concerning corroboration.<sup>69</sup> The rationale behind not requiring corroboration would seem to be threefold: (1) in many cases the offense would be impossible to corroborate because it generally occurs in private, (2) jurors are naturally suspicious of the victim's testimony anyway, and (3) the court has the power to set aside the verdict for insufficient evidence if necessary.<sup>70</sup> Furthermore, the new law provides that a special instruction be given to the jury to insure that they evaluate the complainant's testimony with particular care in view of her emotional involvement and the difficulty in determining the truth with respect to alleged sexual activities carried out in private.<sup>71</sup>

All of the offenses encompassed by the *Crimes Code's* rape provision are designated felonies of the first degree<sup>72</sup> carrying a maximum term of imprisonment of twenty years.<sup>73</sup> In contrast, the *P.B.A. Proposed Code* attempted to vary the penalty according to the gravity of the actor's imposition upon the victim. It chose two objective criteria to serve as a basis for distinguishing a first degree from a second degree felony. Thus if (1) in the course of the act the male inflicted serious bodily injury upon anyone, or (2) if the victim were not a voluntary social companion of the actor on the occasion of the crime and had not previously permitted him sexual liberties, the act was classified a first degree felony.<sup>74</sup>

The former criterion had been employed in the old law to elevate the crime to first degree<sup>75</sup> and its justification is apparent.

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68. MODEL PENAL CODE § 207.4, Comment at 250 (Tent. Draft No. 4, 1955).

69. See notes 24 and 31 and accompanying text *supra*.

70. MODEL PENAL CODE § 207.4, Comment at 264 (Tent. Draft No. 4, 1955).

71. PA. STAT. ANN. tit. 18, § 3106 (Supp. 1973). Pa. House Bill No. 550, Session of 1973 (printer's No. 624), which would repeal this section of the *Crimes Code*, passed the House of Representatives by a vote of 132-54 on May 22, 1973, and was referred to the Senate Judiciary Committee on May 29, 1973.

72. PA. STAT. ANN. tit. 18, § 3121 (Supp. 1973).

73. PA. STAT. ANN. tit. 18, § 1103(1) (Supp. 1973).

74. P.B.A. PROPOSED CODE § 1202(a) (1971).

75. Act of May 12, 1966, No. 1, § 1, [1966] Pa. Laws 84 (repealed 1972).

The latter criterion was essentially designed to encompass attacks by strangers, attacks which were reasonably deemed to be among the most offensive. The *P.B.A. Proposed Code* would thus have significantly lowered the penalty imposed under the prior statute from life to twenty years when serious bodily injury resulted, and from twenty years to ten years when it did not, and would have imposed the same penalty as the old law, twenty years, if no serious bodily injury resulted but the actor was a "stranger."<sup>76</sup>

By comparison the *Crimes Code* imposes a maximum sentence of twenty years regardless of the circumstances surrounding the offense.<sup>77</sup> Consequently, a sentence different from that which the old law would have imposed will result only when serious bodily injury occurs. In this situation the penalty is decreased by the *Crimes Code* from life imprisonment to twenty years.<sup>78</sup>

### C. *Statutory Rape Under the Pennsylvania Crimes Code*

The *Crimes Code* essentially re-enacts the old law's statutory rape provision, with one important exception: the female is no longer required to be "of good repute."<sup>79</sup> It is submitted that if the reason for protecting underage females against the consequences of their own consent in the old law was that they lacked any real capacity for judgment in this regard, then it was inconsistent for the former statute to allow acquittal of a defendant because of the victim's previous unchastity. Moreover, the unchastity of the victim may very well have indicated a prior victimization, which assuredly should not have provided a defense to a subsequent victimizer.<sup>80</sup> These arguments in favor of the elimination of the requirement of previous chastity become all the more persuasive when it is realized that the criterion by which the old law judged the

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76. If the offense would have been rape under the old law, but would have been Gross Sexual Imposition under the P.B.A. proposal, the penalty would be reduced from life or twenty years (depending upon whether serious bodily injury occurred) to a maximum of seven years. P.B.A. PROPOSED CODE § 1202(b) (1971); Act of May 12, 1966, No. 1, § 1, [1966] Pa. Laws 84 (repealed 1972).

77. PA. STAT. ANN. tit. 18, §§ 1103(1), 3121 (Supp. 1973).

78. PA. STAT. ANN. tit. 18, §§ 1103(1), 3121 (Supp. 1973); Act of May 12, 1966, No. 1, § 1, [1966] Pa. Laws 84 (repealed 1972).

79. Act of May 12, 1966, No. 1, § 1, [1966] Pa. Laws 84 (repealed 1972). PA. STAT. ANN. tit. 18, § 3122 (Supp. 1973) provides:

A person who is 16 years of age or older commits statutory rape, a felony of the second degree, when he engages in sexual intercourse with another person not his spouse who is less than 16 years of age.

Pa. Senate Bill No. 126, Session of 1973 (printer's No. 126), which is currently in committee, would make it a defense to prosecution under this section for the actor to prove by a preponderance of the evidence that the alleged victim had, prior to the time of the offense charged, engaged promiscuously in sexual relations with others.

80. MODEL PENAL CODE § 207.4, Comment at 254 (Tent. Draft No. 4, 1955).

victim's virtue was her general *reputation* for chastity in the community, which reputation may indeed have been totally unfounded.

Of course, it is not difficult to visualize the situation where the underage female is the aggressor, and this is probably the situation at which the old statute was directed. The solution to this problem, however, does not lie in requiring prior chastity of the victim. Rather, it is submitted that the solution lies in lowering the female's age of consent from sixteen to an age at which any sexual contact, even consensual, would indicate sexual abnormality in the male. In this way, the exclusion from rape of the situation in which a sexually aggressive female "victimizes" a male would be assured, since the male engaging in sexual intercourse with a girl so young can not realistically be considered a victim. The *Model Penal Code* recommends that ten be the age of consent;<sup>81</sup> the *N.J. Proposed Code* establishes twelve as the age of consent.<sup>82</sup>

Consideration of the rationale behind the *Crimes Code's* disallowance of mistake as to the victim's age as a defense<sup>83</sup> leads to the same conclusion reached above, i.e. that the age of consent under the *Crimes Code* should be lowered. This provision of the new law is patterned after the corresponding provision in the *Model Penal Code* which, however, established the relevant age to be ten rather than sixteen.<sup>84</sup> The rationale behind the *Model Penal Code's* provision is that any error likely to be made with respect to ten year old females would still have the victim far below the age for sexual pursuit by normal males.<sup>85</sup> When, however, this age is elevated to sixteen, what is manifested by the actor is not sexual abnormality, but merely defiance of social convention. Furthermore, as the female's age increases from ten, not only does the sexual act gradually lose its abnormality, but also bona fide mistakes gradually become easier to make.

Finally, the *Crimes Code* changes the old law by designating the offense as a felony of the second degree.<sup>86</sup> Thus the maximum punishment is reduced under the new law from fifteen years to ten years imprisonment.<sup>87</sup> However, because of the increased risk of physical and psychological injury present in situations in-

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81. MODEL PENAL CODE § 213.1(1)(d) (Proposed Official Draft, 1962).

82. N.J. PROPOSED CODE § 2C:14-1 (1971).

83. PA. STAT. ANN. tit. 18, § 3102 (Supp. 1973).

84. MODEL PENAL CODE § 213.6(1) (Proposed Official Draft, 1962).

85. MODEL PENAL CODE § 207.4, Comment at 255 (Tent. Draft No. 4, 1955).

86. PA. STAT. ANN. tit. 18, § 3122 (Supp. 1973).

87. PA. STAT. ANN. tit. 18, § 1103(2) (Supp. 1973); Act of May 12, 1966, No. 3, § 1, [1966] Pa. Laws 84 (repealed 1973).

volving sexual intercourse with minors, it is submitted that more severe penalties are warranted. Both the *Model Penal Code* and *P.B.A. Proposed Code* endorsed this general policy by distributing the offense between first and second degree.<sup>88</sup>

## II. THE MEANING OF THE NEW JERSEY PROPOSED CODE— RAPE AND RELATED OFFENSES

### A. *Differences of the Existing New Jersey Law from the Former Law of Pennsylvania*

In general, the present rape law of New Jersey is similar to the former law of Pennsylvania. Although set forth in a single provision, New Jersey law divides the crime into two categories, rape and carnal abuse, which correspond roughly to what was in Pennsylvania forcible rape and statutory rape.<sup>89</sup>

*Rape:* The New Jersey statute requires that the male have "carnal knowledge" and that the act be committed "forcibly and against [the female's] will."<sup>90</sup> Both of these elements have been interpreted in much the same way as they had been in Pennsylvania.<sup>91</sup> Although the New Jersey statute contains an explicit provision relating to those situations in which the victim is "under the influence of any narcotic drug,"<sup>92</sup> Pennsylvania law had come to the same result without benefit of specific statutory language.<sup>93</sup> New Jersey law also corresponds to the former Pennsylvania law with respect to many of the problem areas previously discussed, such as the actor's knowledge of the victim's condition, self-induced intoxication of the victim, lack of distinction between degrees of criminality of the actor's conduct, and lack of authority concerning situations of fraudulently obtained consent.<sup>94</sup>

A difference does exist, however, with respect to sentencing. In New Jersey the offense of rape is a high misdemeanor for conviction of which the offender may be sentenced to a maximum term of thirty years.<sup>95</sup>

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88. MODEL PENAL CODE § 213.1(1) (Proposed Official Draft, 1962); P.B.A. PROPOSED CODE § 1202(a) (1971).

89. N.J. STAT. ANN. § 2A:138-1 (1969).

90. *Id.*

91. *E.g.*, *State v. Orlando*, 119 N.J.L. 175, 183, 194 A. 879, 883 (Sup. Ct. 1937) (interpretation of carnal knowledge). In *State v. Terry*, 89 N.J. Super. 445, 215 A.2d 374, 376 (App. Div. 1965) (interpretation of "forcibly and against her will") the court said,

Generally, if a woman assaulted is physically and mentally able to resist, is not terrified by threats, and is not in a place and position that resistance would have been useless, it must be shown that she did, in fact, resist the assault.

For the Pennsylvania position, see notes 7-19 and accompanying text *supra*.

92. N.J. STAT. ANN. § 2A:138-1 (1969).

93. *E.g.*, *Commonwealth v. Stephens*, 143 Pa. Super. 394, 17 A.2d 919 (1941).

94. See notes 14-15, 20, 51-57 and accompanying text *supra*.

95. N.J. STAT. ANN. § 2A:138-1 (1969). In Pennsylvania a person

*Carnal Abuse:* New Jersey's existing law differs from Pennsylvania's old law to a much greater extent with respect to sexual relations with minors. In the first place, the New Jersey statute requires only that the actor "carnally abuse" the female.<sup>96</sup> This has been defined as "[d]ebauchery of the female sexual organs by those of the male *which does not amount to penetration*"<sup>97</sup> and may thus be distinguished from "carnal knowledge." Secondly, the prior unchastity or bad reputation of the victim is immaterial in New Jersey. Thirdly, although the New Jersey statute imposes the same penalty as did the Pennsylvania statute when the victim is between the ages of twelve and fifteen (inclusive), fifteen years, it provides for a much greater penalty than did the Pennsylvania statute when the victim is younger than twelve (maximum thirty years).<sup>98</sup>

Finally, the law of New Jersey, like the prior law of Pennsylvania, does not require corroboration of the victim's testimony for a conviction of rape<sup>99</sup> or carnal abuse,<sup>100</sup> nor does it allow mistake as to the victim's age to provide a defense for the actor.<sup>101</sup>

#### B. *Comparative Analysis of the New Jersey Proposed Code—Rape and Related Offenses*

In its general approach and format the *N.J. Proposed Code* is nearly identical with the *Model Penal Code* and the *P.B.A. Proposed Code*, and consequently significantly different from the *Pennsylvania Crimes Code*. The major difference between the New Jersey proposal and the new Pennsylvania law is that the New Jersey proposal discards the classifications of forcible and statu-

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convicted of rape could have been sentenced to life imprisonment if serious bodily injury resulted from the commission of the offense. Otherwise, the maximum penalty was twenty years. Act of May 12, 1966, No. 1, § 1, [1966] Pa. Laws 84 (repealed 1972).

Under New Jersey law a person convicted of a sex offense may be committed to an institution for treatment upon recommendation of a diagnostic center. He may not be committed, however, for a period longer than that authorized for the crime committed. See N.J. STAT. ANN. §§ 2A:164-3 *et seq.* (1971).

96. N.J. STAT. ANN. § 2A:138-1 (1969).

97. *State v. Huggins*, 84 N.J.L. 254, 87 A. 630, 632 (Ct. Err. & App. 1913) (emphasis supplied).

98. N.J. STAT. ANN. § 2A:138-1 (1969).

99. *E.g.*, *State v. Garcia*, 83 N.J. Super. 345, 199 A.2d 860 (App. Div. 1964).

100. *E.g.*, *State v. Andoloro*, 108 N.J.L. 47, 154 A. 819, 821 (Sup. Ct. 1931).

101. *E.g.*, *State v. Moore*, 105 N.J. Super. 567, 253 A.2d 579, 583 (App. Div. 1969).



tory rape in favor of Aggravated Rape and Rape,<sup>102</sup> the basis of distinction between the two offenses being not the consent of the victim, but the gravity of the actor's imposition on her, and accordingly the severity of the penalty. Except for the points that immediately follow, the New Jersey proposal is in all respects substantially the same as the *P.B.A. Proposed Code* set forth above.<sup>103</sup>

The New Jersey proposal follows the *Model Penal Code*<sup>104</sup> by including within its less severe offense, Rape, rather than within Aggravated Rape, the "mental defect" subsection.<sup>105</sup> By so providing, the New Jersey proposal solves the problem which the P.B.A. proposal created and the *Pennsylvania Crimes Code* compounds, by reducing the punishment imposed on the defendant so that it more realistically conforms to the less serious character of his behavior. With respect to Aggravated Rape, the *N.J. Proposed Code* again follows the *Model Penal Code*<sup>106</sup> by including the situation in which the male has sexual intercourse with the female under the threat of extreme pain directed against anyone.<sup>107</sup>

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102. N.J. PROPOSED CODE § 2C:14-1 (1971) provides:

a. *Aggravated Rape.* A male who has sexual intercourse with a female not his wife is guilty of aggravated rape if:

(1) he compels her to submit by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on her or on any other person;

(2) he has substantially impaired her power to appraise or control her conduct by administering or employing without her knowledge drugs, intoxicants or other means for the purpose of preventing resistance; or

(3) the female is unconscious; or

(4) the female is less than 12 years old.

Aggravated rape is a crime of the first degree if (a) in the course thereof the actor inflicts serious bodily injury upon anyone, or (b) the victim was not a voluntary social companion of the actor upon the occasion of the crime and had not previously permitted him sexual liberties. Otherwise the offense is a crime of the second degree. Sexual intercourse includes intercourse per os or per anum with some penetration, however slight; emission is not required.

b. *Rape.* A male who has sexual intercourse with a female not his wife commits a crime of the third degree if:

(1) he compels her to submit by any threat that would prevent resistance by a woman of ordinary resolution; or

(2) he knows that she suffers from a mental disease or defect which renders her incapable of appraising the nature of her conduct; or

(3) he knows that she is unaware that a sexual act is being committed upon her or that she submits because she mistakenly supposes that he is her husband.

103. P.B.A. PROPOSED CODE §§ 1202(a), (b) (1971) (quoted in notes 39 and 46 *supra*).

104. MODEL PENAL CODE § 213.1(2) (Proposed Official Draft, 1962).

105. N.J. PROPOSED CODE § 2C:14-1(b)(2) (1971) (quoted in note 102 *supra*). See also notes 59-62 and accompanying text *supra*.

106. MODEL PENAL CODE § 213.1(1)(a) (Proposed Official Draft, 1962).

107. N.J. PROPOSED CODE § 2C:14-1(a)(1) (1971) (quoted in note 102 *supra*). The P.B.A. PROPOSED CODE omitted this. See note 39 *supra*. It is submitted that this threat is just as compelling as the others enunciated in this subsection, however, and therefore as appropriate for inclusion within it.

Turning to the less serious offense of Rape, the New Jersey proposal would make three significant changes in its existing law. First, it follows the *Model Penal Code* and the *P.B.A. Proposed Code* by requiring penetration, however slight, for offenses with underage females.<sup>108</sup> The "slightest penetration rule" has been criticized as punishing attempt rather than completed offense and as encompassing as rape sexual activity in which some females voluntarily engage who would nevertheless strenuously resist any attempt to penetrate the vagina.<sup>109</sup> Nevertheless, it is submitted that the adoption of the rule is justified in light of (1) the reduced penalties of the New Jersey proposal and (2) "the greater reliance that can be placed on the verity of the complaining witness' testimony where the issue is whether there was *any* penetration rather than how much."<sup>110</sup>

The second change that would be made to New Jersey's existing law is the lowering of the age of consent from sixteen to twelve,<sup>111</sup> the younger of the two ages designated in the present statute.<sup>112</sup> In contrast, the age of consent under the *Pennsylvania Crimes Code* is sixteen<sup>113</sup> and under the P.B.A. proposal was fifteen.<sup>114</sup> By thus decreasing the age of consent, the New Jersey proposal restores the rationale behind its provision disallowing mistake as to the victim's age as a defense.<sup>115</sup> Furthermore, as stated previously,<sup>116</sup> the reduction in the age of consent practically assures that the case of a sexually aggressive female "victimizing" a male will not fall within Aggravated Rape.

Thirdly, the New Jersey proposal corresponds with the *Model Penal Code*, but is in opposition to both the P.B.A. proposal and the *Pennsylvania Crimes Code*, by requiring corroboration of the victim's testimony in order to convict the defendant.<sup>117</sup> Corroboration is not presently required under the law of New Jersey, nor

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108. MODEL PENAL CODE § 213.1(1) (Proposed Official Draft, 1962); N.J. PROPOSED CODE § 2C:14-1(a) (1971); P.B.A. PROPOSED CODE § 1201(2) (1971).

109. M. PLOSCOWE, SEX AND THE LAW 173, 192 (1951).

110. MODEL PENAL CODE § 207.4, Comment at 244 (Tent. Draft No. 4, 1955).

111. Consenting females between the ages of twelve and fifteen are encompassed by Corruption of Minors. See text accompanying notes 220-45 *infra*.

112. N.J. STAT. ANN. § 2A:138-1 (1969).

113. PA. STAT. ANN. tit. 18, § 3122 (Supp. 1973).

114. P.B.A. PROPOSED CODE § 1202(a) (1971).

115. N.J. PROPOSED CODE § 2C:14-6(a) (1971).

116. See notes 83-85 and accompanying text *supra*.

117. N.J. PROPOSED CODE § 2C:14-6(d) (1971); MODEL PENAL CODE § 213.6(5) (Proposed Official Draft, 1962).

does it seem necessary in light of the other means available to insure a just result.<sup>118</sup>

Finally, the New Jersey proposal would decrease the existing penalties in the case of rape from thirty years to a maximum of twenty years if serious bodily injury resulted or to a maximum of ten years if it did not.<sup>119</sup> With respect to consensual offenses committed with minors, the existing punishment of thirty years when the female is less than twelve years of age would be reduced to twenty years or ten years depending upon the occurrence of serious bodily injury,<sup>120</sup> and from thirty years to a maximum of five years if the female is between the ages of twelve and fifteen (inclusive).<sup>121</sup>

### III. THE MEANING OF THE PENNSYLVANIA CRIMES CODE— DEVIATE SEXUAL INTERCOURSE

#### A. *Former Sodomy Law in Pennsylvania*

Pennsylvania's prior sodomy law<sup>122</sup> prohibited both involuntary and consensual behavior, whether performed homosexually or heterosexually, of the type described therein as "[carnal knowledge of] any male or female person by anus or by or with the mouth."<sup>123</sup> This had been interpreted by the Pennsylvania courts to require penetration,<sup>124</sup> but not necessarily of the male sex organ,<sup>125</sup> and therefore the offense included cunnilingus as well as fellatio.<sup>126</sup> Also prohibited was any type of carnal knowledge of any bird or animal.<sup>127</sup> The offense was designated as a felony with a maximum term of imprisonment of ten years.<sup>128</sup> Corroboration was not required for a conviction.<sup>129</sup>

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118. See notes 70-71 and accompanying text *supra*.

119. N.J. STAT. ANN. § 2A:138-1 (1969); N.J. PROPOSED CODE § 2C:14-1 (1971).

120. N.J. STAT. ANN. § 2A:138-1 (1969); N.J. PROPOSED CODE § 2C:14-1 (1971).

121. N.J. STAT. ANN. § 2A:138-1 (1969); N.J. PROPOSED CODE § 2C:14-3 (1971). The N.J. proposal provides for extended terms of imprisonment in special cases where the defendant is a persistent offender, a professional criminal, a multiple offender, or is a dangerous, mentally abnormal person. See N.J. PROPOSED CODE §§ 2C:43-7, 44-3 (1971).

122. Act of June 24, 1939, No. 375, § 501, [1939] Pa. Laws 872 (repealed 1972).

123. *Id.*

124. *E.g.*, *Commonwealth v. Green*, 210 Pa. Super. 482, 484, 233 A.2d 921, 923 (1967).

125. *Commonwealth v. Burkett*, 11 Pa. D. & C.2d 654 (Cambria O. & T. 1956).

126. *Id.*

127. Act of June 24, 1939, No. 375, § 501, [1939] Pa. Laws 872 (repealed 1972).

128. *Id.* Sentence could be imposed alternatively under the provisions of the Barr-Walker Act, see note 23 *supra*.

129. *E.g.*, *Commonwealth v. Logan*, 199 Pa. Super. 635, 184 A.2d 321 (1962); *Commonwealth v. Nestor*, 183 Pa. Super. 350, 132 A.2d 369 (1959).

**B. Deviate Sexual Intercourse under the Pennsylvania Crimes Code**

The new law discards the term "sodomy" and replaces it with the phrase "deviate sexual intercourse."<sup>130</sup> This is defined as "sexual intercourse per os or per anus between human beings who are not husband and wife, and any form of sexual intercourse with an animal."<sup>131</sup> Thus, the basis of distinction between Deviate Sexual Intercourse and Rape under the *Crimes Code* is that the former applies to sexual behavior with animals and to sexual conduct between human beings exclusive of ordinary sexual intercourse, whereas the latter deals with sexual behavior between human beings whether it be normal or per os or per anus. Unlike the *P.B.A. Proposed Code*, however, the *Pennsylvania Crimes Code* does not limit Rape to exclusively heterosexual behavior, confining homosexual contacts to Deviate Sexual Intercourse.<sup>132</sup> Rather, under the new law, both heterosexual and homosexual conduct are encompassed within both offenses.<sup>133</sup> Further, unlike the old law which imposed criminal sanctions even when the participants were husband and wife, the *Crimes Code* definition of deviate sexual intercourse explicitly excludes them from the operation of its provision.<sup>134</sup>

The new law divides the offense into two separate provisions: Involuntary Deviate Sexual Intercourse and Voluntary Deviate Sexual Intercourse.<sup>135</sup> The former is closely patterned after the *Crimes Code's* Rape and Statutory Rape provisions<sup>136</sup> and hence incorporates many of the same deficiencies that were indicated in relation to those crimes.<sup>137</sup> It is submitted that perhaps the most serious deficiency of the *Crimes Code* in this area is its failure to differentiate those situations involving greater compulsion

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130. PA. STAT. ANN. tit. 18, § 3123 (Supp. 1973).

131. *Id.* § 3101.

132. PA. STAT. ANN. tit. 18, §§ 3121, 23 (Supp. 1973); P.B.A. PROPOSED CODE §§ 1202-03 (1971).

133. PA. STAT. ANN. tit. 18, §§ 3121, 23 (Supp. 1973).

134. *Id.* § 3123.

135. PA. STAT. ANN. §§ 3123, 24 (Supp. 1973).

136. PA. STAT. ANN. § 3123 (Supp. 1973) provides:

A person commits a felony of the first degree when he engages in deviate sexual intercourse with another person:

- (1) by forcible compulsion;
- (2) by threat of forcible compulsion that would prevent resistance by a person of reasonable resolution;
- (3) who is unconscious;
- (4) who is so mentally deranged or deficient that such person is incapable of consent; or
- (5) who is less than 16 years of age.

137. See text accompanying notes 32-78 *supra*.

from those involving significantly less. By treating all of these situations in a single provision, which it designates as a felony of the first degree, the new law fails to seize the opportunity to correct the anomalous position of the old law, and instead perpetuates it. Furthermore, regardless of the circumstances, if the victim's participation in the sexual act is "involuntary," the actor may be sentenced to a maximum of twenty years under the Crimes Code,<sup>138</sup> whereas under the old statute the maximum penalty was ten years.<sup>139</sup> Indeed, the penalty imposed by the *Crimes Code* under Involuntary Deviate Sexual Intercourse is heavier than that authorized by it for statutory rape. This ignores the long established policy of punishing rape, especially of minors, more severely than other sexual offenses perpetrated against adults because of the increased risk of physical harm resulting from pregnancy or abortion that is present.

In contrast with the *Crimes Code*, the *P.B.A. Proposed Code* established a framework within which the offenses were graded according to the degree of compulsion involved in the act. The P.B.A. proposal divided the offense into two sections entitled Deviate Sexual Intercourse—By Force or Its Equivalent and Deviate Sexual Intercourse—By Other Imposition.<sup>140</sup> These two provisions are analogous to and correspond almost verbatim with the P.B.A. proposal's Rape and Gross Sexual Imposition sections.<sup>141</sup> A violation of the former is designated a felony of the second degree punishable by a maximum of ten years imprisonment,<sup>142</sup> whereas a violation of the latter is a felony of the third degree punishable by a maximum of seven years.<sup>143</sup> By thus graduating the punishment to correspond with the severity of the offense, the *P.B.A. Proposed Code* went a long way toward fulfilling one of its primary goals of creating a more equitable legal system.

The second section in this area in the *Crimes Code* contemplates all situations in which deviate sexual intercourse occurs that are not covered in the first section.<sup>144</sup> Essentially, this amounts to

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138. PA. STAT. ANN. tit. 18, §§ 1103, 3123 (Supp. 1973).

139. Act of June 24, 1931, No. 375, § 501, [1939] Pa. Laws 872 (repealed 1972).

140. P.B.A. PROPOSED CODE §§ 1203(a), (b) (1971).

141. P.B.A. PROPOSED CODE §§ 1202(a), (b) (1971) (quoted in notes 39 and 46 *supra*). There is only one change other than the fact that these provisions are concerned with deviate rather than normal sexual intercourse. The subsection dealing with mental disease is included within the less severe offense of the two here, whereas it is included within the more serious offense of the two rape provisions. It is submitted that the Pennsylvania Bar Association's action in transferring this subsection impliedly recognizes the arguments advanced against including this clause under Rape (see text accompanying notes 60-62 *supra*) and raises the inference that the subsection was misplaced only to conform the proposal to Pennsylvania's anomalous rape law existing at that time.

142. P.B.A. PROPOSED CODE § 1203(a) (1971).

143. *Id.* § 1203(b).

144. PA. STAT. ANN. tit. 18, § 3124 (Supp. 1973) provides:

imposing criminal sanctions on voluntary deviate sexual intercourse, and the section is so entitled. This provision corresponds to the old law under which consent was immaterial, but significantly mitigates the penalty. Under the *Crimes Code*, the offense is classified as a misdemeanor of the second degree, which subjects the defendant to a maximum of two years imprisonment.<sup>145</sup> The prior statute authorized a maximum term of imprisonment of ten years.<sup>146</sup>

Notwithstanding this improvement, however, numerous arguments can be marshalled against the imposition of any penalty whatsoever upon voluntary deviate sexual intercourse. Among these are the following: (1) no harm to the secular interests of the community is involved in atypical sexual practice committed in private between consenting adult partners, (2) the existing law is substantially unenforced and unenforceable, and the maintaining of such laws thus brings the law into disrepute, (3) conviction and imprisonment of homosexual offenders is not conducive to cures and indeed may be more akin to "throwing Brer Rabbit into the briarpatch,"<sup>147</sup> (4) the existence of a criminal threat probably acts more as a deterrent to homosexual offenders from psychiatric and medical assistance than as a deterrent from the commission of the crime itself, (5) enforcement of the present law creates practical problems of police administration by putting a strain on already over-taxed police resources and by creating morale problems among the police force,<sup>148</sup> and (6) the existing law infringes upon the fundamental rights of the individual to be free from State interference in his personal affairs when he is not hurting others.<sup>149</sup>

A consideration of these problems led the American Law Institute to exclude from the criminal law "all sexual practices not involving force, adult corruption of minors, or public offenses . . . ." <sup>150</sup> In partial recognition of the above arguments, the

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A person who engages in deviate sexual intercourse under circumstances not covered by Section 3123 of this title is guilty of a misdemeanor of the second degree.

145. PA. STAT. ANN. tit. 18, §§ 1104, 3124 (Supp. 1973).

146. Act of June 24, 1939, No. 375, § 501, [1939] Pa. Laws 872 (repealed 1972).

147. *Perkins v. North Carolina*, 234 F. Supp. 333, 339 (W.D.N.C. 1964).

148. Policemen required to entrap homosexuals by flirting with them, etc. resent such duty. Also present is the temptation toward bribery and extortion.

149. See NAT'L INSTITUTE OF MENTAL HEALTH, FINAL REPORT OF THE TASK FORCE ON HOMOSEXUALITY (1969); COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION, THE WOLFENDON REPORT (1956); M. PLOSCOWE, SEX AND THE LAW (1951) for discussion of these arguments.

150. MODEL PENAL CODE § 207.5, Comment at 267-79 (Tent. Draft No. 4, 1955).

P.B.A. proposal suggested two alternatives. Alternative A was adopted by the *Crimes Code* and is now the law.<sup>151</sup> Alternative B, however, would have imposed criminal sanctions only if one of the participants were under twenty-one years of age.<sup>152</sup>

#### IV. THE MEANING OF THE NEW JERSEY PROPOSED CODE— DEVIATE SEXUAL INTERCOURSE

##### A. *Differences of the Existing New Jersey Law from the Former Law of Pennsylvania*

The New Jersey statute refers to sodomy as the "infamous crime against nature committed with man or beast" and without further description provides for a maximum term of twenty years for its commission.<sup>153</sup> This is twice the penalty that was authorized in Pennsylvania. The statute has been interpreted by the New Jersey courts to include anal intercourse<sup>154</sup> and not to require emission<sup>155</sup> as in Pennsylvania,<sup>156</sup> but to exclude fellatio and cunnilingus<sup>157</sup> in contrast to what the Pennsylvania courts had held under Pennsylvania's former law.<sup>158</sup> Mouth-genital contact may be punished by a maximum term of three years<sup>159</sup> in New Jersey, however, under its statute entitled Lewdness or Indecency.<sup>160</sup> As in Pennsylvania under the former law, consent is immaterial and corroboration is not required in New Jersey.<sup>161</sup>

##### B. *Comparative Analysis of the New Jersey Proposed Code— Deviate Sexual Intercourse*

The New Jersey proposal defines deviate sexual intercourse in the same way as the *Pennsylvania Crimes Code* except that it excludes from criminal sanction private sexual relations with animals.<sup>162</sup> This probably comports better with the general philosophy advanced in the *Model Penal Code* concerning voluntary atypical sexual practices.<sup>163</sup> Additionally, by defining deviate sexual intercourse in otherwise the same way as the *Crimes Code*, the

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151. PA. STAT. ANN. tit. 18, § 3124 (Supp. 1973) (quoted in note 144 *supra*).

152. P.B.A. PROPOSED CODE § 1203(c), Alternative B (1971).

153. N.J. STAT. ANN. § 2A:143-1 (1969). If the act is committed with a child less than sixteen years of age, the maximum term of imprisonment is thirty years. N.J. STAT. ANN. § 2A:143-2 (1969).

154. *E.g.*, State v. Pitman, 98 N.J.L. 626, 121 A. 597 (Sup. Ct. 1923).

155. *E.g.*, State v. Taylor, 46 N.J. 316, 217 A.2d 1, 11 (1966).

156. See notes 123-25 and accompanying text *supra*.

157. *E.g.*, State v. Morrison, 25 N.J. Super. 534, 96 A.2d 723, 724 (Essex County Ct. 1953).

158. See note 126 and accompanying text *supra*.

159. N.J. STAT. ANN. § 2A:85-7 (1969).

160. N.J. STAT. ANN. § 2A:115-1 (1969).

161. State v. Fleckenstein, 60 N.J. Super. 399, 159 A.2d 411 (App. Div. 1960).

162. N.J. PROPOSED CODE § 2C:14-2(a) (1971).

163. See note 150 and accompanying text *supra*.

*New Jersey Proposed Code* encompasses fellatio and cunnilingus, which are not presently included within the New Jersey sodomy law. By so doing, the New Jersey proposal would rectify the injustice inherent in the existing law by which some male homosexual practices are punished much more severely (maximum of twenty years) than female homosexual practices (maximum of three years).

With respect to Aggravated Sodomy,<sup>164</sup> which is the New Jersey proposal's counterpart to Involuntary Deviate Sexual Intercourse in the *Pennsylvania Crimes Code* and to Deviate Sexual Intercourse—By Force or Its Equivalent in the P.B.A. proposal, the first change that is apparent is the age group to which this provision relates. Although under the existing New Jersey law voluntary participants of any age are subject to criminal sanction, and a more severe penalty is imposed for sodomy with a child less than sixteen years of age,<sup>165</sup> under the New Jersey proposal criminal sanctions are only imposed under Aggravated Sodomy for consensual deviate sexual intercourse if one of the participants is less than twelve.<sup>166</sup> Offenders between the ages of twelve and fifteen (inclusive) are dealt with under Corruption of Minors.<sup>167</sup> This differs from the *Pennsylvania Crimes Code* which encompasses participants up to the age of fifteen within its involuntary deviate sexual intercourse provision.<sup>168</sup>

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164. N.J. PROPOSED CODE § 2C:14-2(a) (1971):

a. *Aggravated Sodomy*. A person who engages in deviate sexual intercourse or who causes another to engage in deviate sexual intercourse, is guilty of aggravated sodomy if:

(1) he compels the other person to participate by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone; or

(2) he has substantially impaired the other person's power to appraise or control his conduct, by administering or employing without the knowledge of the other person drugs, intoxicants or other means for the purpose of preventing resistance; or

(3) the other person is less than 12 years old.

Aggravated sodomy is a crime of the first degree if (i) in the course thereof the actor inflicts serious bodily injury upon anyone, or (ii) the victim was not a voluntary social companion of the actor upon the occasion of the crime and had not previously permitted the actor sexual liberties. Otherwise it is a crime of the second degree.

Deviate sexual intercourse means sexual intercourse per os or per anum between human beings who are not husband and wife.

165. N.J. STAT. ANN. § 2A:143-2 (1969).

166. N.J. PROPOSED CODE § 2C:14-2(a) (1971) (quoted in note 164 *supra*).

167. N.J. PROPOSED CODE § 2C:14-3 (1971). See text accompanying notes 220-45 *supra*.

168. PA. STAT. ANN. tit. 18, § 3123(5) (Supp. 1973) (quoted in note 136 *supra*).



Secondly, the New Jersey proposal omits the provision dealing with unconscious persons which is contained in its own aggravated rape provision and in both the rape and involuntary deviate sexual intercourse provisions of the *Pennsylvania Crimes Code*.<sup>169</sup> Thus, read literally, the New Jersey proposal would condone deviate sexual intercourse with unconscious persons or at best would encompass this situation only under the third subsection of its simple sodomy provision.<sup>170</sup> This clause, however, is theoretically intended to encompass only situations of fraudulently obtained consent. Even if its language were stretched to include deviate sexual intercourse with unconscious persons, the penalty (maximum five years) is far too lenient for the gravity of the conduct. Thus, it is submitted that the omission of this provision is either a serious deficiency or a considerable oversight.

Thirdly, the New Jersey proposal grades the offenses encompassed by Aggravated Sodomy differently from the *Pennsylvania Crimes Code* and the P.B.A. proposal. Whereas the P.B.A. *Proposed Code* designated all offenses included in its corresponding provision felonies of the second degree and the *Pennsylvania Crimes Code* designates all as first degree, the New Jersey proposal adopts the same system used under its rape section to distribute the offenses between crimes of the first and crimes of the second degree.<sup>171</sup> It is submitted that this basis for distinguishing the severity of offenses is as valid here as it was in connection with rape. The penalties imposed, however, should not be, but nevertheless are, as severe as the parallel offenses under Aggravated Rape. The New Jersey proposal, however, would significantly lessen the existing penalties.

With respect to voluntary deviate sexual intercourse not involving minors, the New Jersey proposal adheres to the position of the *Model Penal Code* and is in direct opposition to the *Pennsylvania Crimes Code* by eliminating all criminal sanctions. By so doing, the New Jersey proposal would significantly alter the existing law which punishes the act regardless of consent. As with other sexual offenses in the *New Jersey Proposed Code*, and in contrast to the *Pennsylvania Crimes Code*, corroboration of the complainant's testimony is made mandatory for conviction of Aggra-

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169. PA. STAT. ANN. tit. 18, §§ 3121, 3123 (Supp. 1973) (quoted in notes 32 and 136 *supra*); N.J. PROPOSED CODE § 2C:14-1 (1971) (quoted in note 102 *supra*).

170. N.J. PROPOSED CODE § 2C:14-2(b) (3) (1971):

b. *Sodomy*. A person who engages in deviate sexual intercourse with another person, or who causes another to engage in deviate sexual intercourse, commits a crime of the third degree if:

(3) he knows that the other person submits because he is unaware that a sexual act is being committed upon him.

There is no counterpart to this section in the PENNSYLVANIA CRIMES CODE.

171. N.J. PROPOSED CODE §§ 2C:14-1, 2 (1971) (quoted in notes 102 and 164 *supra*).

vated Sodomy.<sup>172</sup> Finally, the New Jersey proposal adds a third provision to this section found neither in the *Model Penal Code*, the *Pennsylvania Crimes Code*, nor its own existing law, proscribing sexual contact with human dead bodies.<sup>173</sup>

V. THE MEANING OF THE PENNSYLVANIA CRIMES CODE—  
CORRUPTION OF MINORS AND SEDUCTION

A. *The Pennsylvania Law Prior to the Enactment of the Crimes Code*

Corruption of minors was treated in a very general way in the former law under the catch-all statute entitled "Corrupting the Morals of Children or Encouraging them to Commit Crime or Violate Parole."<sup>174</sup> This statute required the actor to be at least eighteen and the minor to be less than eighteen.<sup>175</sup> The maximum penalty authorized for its violation was three years.<sup>176</sup>

The seduction statute that was in effect prior to the enactment of the *Crimes Code* was not repealed by the new law and thus remains in force.<sup>177</sup> Seduction has been defined as the "act of man enticing women to have unlawful intercourse with him by means of persuasion, solicitation, promises, bribes, or other means without employment of force."<sup>178</sup> The Pennsylvania law, however, restricts this definition in two ways. First, it confines the offense to sexual intercourse under the promise of marriage;<sup>179</sup> and in this regard, the cases have stated that mutual engagement is sufficient without a promise in so many words.<sup>180</sup> Moreover, if a marriage ensues, even though it is followed by an immediate desertion,

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172. N.J. PROPOSED CODE § 2C:14-6(d) (1971).

173. *Id.* § 2C:14-2(c).

174. Act of July 25, 1961, No. 366, § 1, [1961] Pa. Laws 848 (repealed 1972):

Whoever, being of the age of 18 years and upwards, by any act corrupts or tends to corrupt the morals of any child under the age of 18 years, or who aids, abets, entices or encourages any such child in the commission of any crime, or who knowingly assaults or encourages such child in violating his or her parole or any order of court, is guilty of a misdemeanor, and, upon conviction thereof shall be sentenced to pay a fine not exceeding one thousand dollars (\$1,000) or undergo imprisonment not exceeding three (3) years, or both.

175. *Id.*

176. *Id.*

177. PA. STAT. ANN. tit. 18, § 4510 (1963).

178. *Van de Velde v. Colle*, 8 N.J. Misc. 782, 152 A. 645, 646 (Cir. Ct. 1930).

179. PA. STAT. ANN. tit. 18, § 4510 (1963).

180. *E.g.*, *Baldy v. Stratton*, 11 Pa. 316 (1849).

it provides a complete defense to the crime.<sup>181</sup> Additionally, the statute provides that the promise of marriage is the only element of the offense which has to be corroborated.<sup>182</sup> The second restriction is that the statute applies only to females of good repute who are less than twenty-one years of age.<sup>183</sup> As with Pennsylvania rape law, it makes no difference that the reputation is undeserved.<sup>184</sup> The statute designates the offense as a misdemeanor and provides for a maximum penalty of three years.<sup>185</sup>

#### B. *Corruption of Minors and Seduction Under the Pennsylvania Crimes Code*

*Corruption of Minors:* The new law re-enacts verbatim the old statute that dealt with corrupting the morals of minors, with the one exception that the maximum penalty is reduced from three years to two years.<sup>186</sup> By so doing the *Crimes Code* incorporates in the new law all of the deficiencies of the former law. Among these are (1) the use of the vague wording "by any act corrupts or tends to corrupt the morals . . .,"<sup>187</sup> (2) the absence of any requirement of a significant age disparity between actor and victim,<sup>188</sup> and (3) the inclusion of crimes other than those related to sexual violation within its scope.

In contrast with the *Crimes Code's* static approach in this area, the P.B.A. proposal made sweeping changes and, it is submitted, significant improvements to the law concerning the corruption of minors. The P.B.A. proposal's provision dealt exclusively with voluntary sexual relations that were criminal solely because of the youth of one of the participants.<sup>189</sup> The provision was confined to

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181. *E.g.*, *Commonwealth v. Eichar*, 4 Clark 326 (Pa. 1849).

182. PA. STAT. ANN. tit. 18, § 4510 (1963).

183. *Id.*

184. *E.g.*, *Commonwealth v. McCarty*, 2 Clark 351 (Pa. 1844).

185. PA. STAT. ANN. tit. 18, § 4510 (1963).

186. PA. STAT. ANN. tit. 18, §§ 1104, 3125 (Supp. 1973); Act of July 25, 1961, No. 366, § 1, [1961] Pa. Laws 848 (repealed 1972) (quoted in note 174 *supra*). The Pennsylvania Legislature has enacted this identical provision in two different places in the *Crimes Code*. The other enactment appears in Chapter 63 of the *Code*, entitled *Minors*, and is there designated a misdemeanor of the *first degree*, which may be punished by a maximum of *five* years imprisonment. PA. STAT. ANN. tit. 18, §§ 1104, 6301 (Supp. 1973).

187. PA. STAT. ANN. tit. 18, § 3125 (Supp. 1973) (same as provision quoted in note 174 *supra*).

188. MODEL PENAL CODE § 207.4, Comment at 253 (Tent. Draft No. 4, 1955) states:

The rationale . . . is victimization of immaturity. It seems necessary, therefore, to recognize that immature males may themselves be victims of adolescence rather than engaged in exploitation of other's inexperience. . . . The most convenient way to give effect to the victimization rationale is to require a substantial age differential in favor of the male.

189. P.B.A. PROPOSED CODE § 1204 (1971):

(a) *Offense Defined.* A male who has sexual intercourse with a female not his wife is guilty of an offense if:

sexual intercourse (as it is defined in the *Crimes Code*)<sup>190</sup> between participants of opposite sexes, and dealt specifically with three types of situations.<sup>191</sup>

The first subsection made sexual intercourse between a female of good repute who was less than sixteen years old and a male who was at least four years older than the female a felony of the third degree.<sup>192</sup> The basis for the criminal sanction was primarily the age disparity of the participants. Under the old law and under the *Crimes Code*, sexual intercourse under these circumstances would be statutory rape, subjecting the defendant to imprisonment for fifteen or ten years respectively,<sup>193</sup> rather than the seven years authorized under the P.B.A. proposal. Despite the seemingly broad effect of this provision toward mitigating the punishment imposed under the old law, closer examination reveals that this section of the P.B.A. proposal applied only when the female was fifteen years old and of good repute, since if she were less than fifteen, the proposal's rape provision would encompass the offense.<sup>194</sup> The requirement of good repute would seem valid in the context of this section since (1) the essence of the offense is the actor's corruption of capable, but innocent, females, and (2) the provision applies only to older adolescents with respect to whom prior sexual relations would not necessarily imply prior victimizations as with statutory rape.<sup>195</sup>

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(1) the female is less than sixteen (16) years old and of good repute and the male is at least four (4) years older than the female; or

(2) the female is less than twenty-one (21) years old and the male is her guardian or otherwise responsible for general supervision of her welfare; or

(3) the female is in custody of law or detained in a hospital or other institution and the male has supervisory or disciplinary authority over her.

(b) Grading. An offense under clause (1) of subsection (a) is a felony of the third degree. Otherwise an offense under this section is a misdemeanor of the second degree.

190. PA. STAT. ANN. tit. 18, § 3101 (Supp. 1973).

191. P.B.A. PROPOSED CODE § 1204 (1971) (quoted in note 189 *supra*).

192. *Id.* § 1204(a) (1).

193. Act of May 12, 1966, No. 1, § 1, [1966] Pa. Laws 84 (repealed 1972); PA. STAT. ANN. tit. 18, §§ 1103, 3122 (Supp. 1973).

194. P.B.A. PROPOSED CODE § 1202(a) (4) (1971).

195. See text accompanying notes 80-81 *supra*. *Quaere*, however, in light of the proposal's general provision relating to sexually promiscuous complainant's, which provides:

It is a defense to prosecution under section 1204 (relating to corruption of minors) . . . for the actor to prove by a preponderance of the evidence that the alleged victim had, prior to the time of the offense charged, engaged promiscuously in sexual relations with minors.

P.B.A. PROPOSED CODE § 1207(c) (1971), whether the inclusion of the words

The second and third subsections of this provision of the P.B.A. *Proposed Code* had no direct counterpart in the old law, nor have they in the *Crimes Code*, and would only be encompassed therein if the general statutory requirements for what the old law entitled "Corrupting the Morals of Minors or Encouraging them to Commit Crime or Violate Parole" were met.<sup>196</sup> These two clauses extended protection to females sixteen years of age and older who stood in a special relationship with the actor. To come within the second subsection, the male must be the female's guardian or "otherwise responsible for general supervision of her welfare."<sup>197</sup> The extension of protection to encompass females between eighteen and twenty years of age (inclusive) was justified on the basis that the actor had voluntarily assumed the duty to look out for the female's well being. To come within the third subsection, the female must be in custody of law or detained in a hospital or other institution and the male must have supervisory or disciplinary authority over her.<sup>198</sup> With respect to these situations, the extension of protection was justified on the basis that coercion and abuse of authority could easily be present when a female is in custody.<sup>199</sup> The maximum term of imprisonment authorized under the P.B.A. proposal for violations of either of these two provisions was one year.<sup>200</sup>

With its corruption of minors provision, the *Pennsylvania Crimes Code* completes the delineation of its suggested system for the disposition of offenders who commit consensual sex crimes with minors. In 1955, the *Model Penal Code* set forth its rationale for classifying and grading such offenses justly and in accordance with the severity of the behavior exhibited.<sup>201</sup> It will be useful at this point to examine this system of classification for comparative purposes. The *Model Penal Code's* classification was based upon the following tri-partite categorization with respect to the age of the victim:

- (1) pre-puberty age—where the victim is less than ten years of age;<sup>202</sup> offenses within this category usually

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"of good repute" in the corruption of minors provision itself is more than merely repetitive, but imposes the additional requirement that the female have a good *reputation* for chastity, rather than simply requiring her not to have *in fact* previously engaged promiscuously in sexual relations with others.

196. Act of July 25, 1961, No. 366, § 1, [1961] Pa. Laws 848 (repealed 1972) (quoted in note 174 *supra*); PA. STAT. ANN. tit. 18, § 3125 (Supp. 1973).

197. P.B.A. PROPOSED CODE § 1204(a)(2) (1971) (quoted in note 189 *supra*).

198. *Id.* § 1204(a)(3).

199. MODEL PENAL CODE § 207.4, Comment at 263 (Tent. Draft No. 4, 1955).

200. P.B.A. PROPOSED CODE §§ 602, 1204 (1971).

201. MODEL PENAL CODE § 207.4, Comment at 252 (Tent. Draft No. 4, 1955).

202. MODEL PENAL CODE § 207.4, Comment at 252 (Tent. Draft No. 4,

- denote aberration in the actor;
- (2) puberty age—where the victim is between the ages of ten and fifteen (inclusive); victims within this category have the physical capacity to engage in sexual relations, but lack sufficient understanding of the social, psychological, and emotional significance of the act so that it is still realistic to regard them as victimized; and
  - (3) later adolescence—where the victim is between the ages of sixteen and twenty (inclusive); the significance of offenses within this category lies primarily in their contravention of the moral standards of the community.

The *Model Penal Code's* scheme of punishment adheres to this rationale regardless of whether the act is sexual intercourse or deviate sexual intercourse, as can be seen from the chart tabulated below.

#### Model Penal Code

##### *Scheme of Punishment for Consensual Sexual Relations with Minors—Applicable for Either Sexual or Deviate Sexual Intercourse*

Actor's Age	Victim's Age	Maximum Penalty
16 and over <sup>203</sup>	Less than 10	Life <sup>204</sup>
Victim's age plus 4 or more (But not less than 16)	10 to 15 (incl.)	5 years
16 and over	16 and over	0 <sup>205</sup>

The *Pennsylvania Crimes Code*, however, designates a much higher age of consent in its statutory rape and deviate sexual in-

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1955) states:

Despite the indication that 12 is the commonest age for the onset of puberty, it seems wise to go well outside the average or modal age, and it is known that significant numbers of girls enter the period of sexual awakening as early as the tenth year.

203. A minimum age of the actor is not specified in any of the MODEL PENAL CODE's provisions dealing with the substantive elements of specific crimes. The MODEL PENAL CODE provides generally, however, that:

- (1) A person shall not be tried for or convicted of an offense if:
  - (a) at the time of the conduct charged to constitute the offense he was less than 16 years of age;

MODEL PENAL CODE § 4.10 (Proposed Official Draft, 1962).

204. Life imprisonment would only be imposed if serious bodily injury resulted from the commission of the offense or if the actor were essentially a stranger to the victim.

205. No penalty is imposed when the victim is 16 years of age or older unless there exists a special relationship between her and the actor. P.B.A. PROPOSED CODE § 1204 (1971) (quoted in note 189 *supra*).

tercourse provisions,<sup>206</sup> thus significantly restricting the applicability of its corruption of minors provision. The result is that its suggested scheme of punishment does not relate to the sexual and psychological maturity of the victim.<sup>207</sup> Moreover, the new law treats sexual intercourse separately and differently from deviate sexual intercourse,<sup>208</sup> resulting in several inconsistencies when the victim is sixteen or older, apparent in the charts below.

Finally, the corruption of minors provision is not well adapted to integration within the overall scheme of punishment because of its relatively high designation of the relevant age and small requisite age disparity.<sup>209</sup> The inconsistencies resulting from this are also displayed in the charts below.

### Pennsylvania Crimes Code

#### *Scheme of Punishment for Consensual Sexual Relations with Minors—Sexual Intercourse*

Male's Age	Female's Age	Maximum Penalty
16 and over	less than 16	10
18 and over	16 or 17	2 <sup>210</sup>
16 or 17	16 or 17	0
X <sup>211</sup>	18 and over	0

#### *Deviate Sexual Intercourse*

Actor's Age	Victim's Age	Maximum Penalty
X	Less than 16	20
X	16 and over	2 <sup>212</sup>

Thus, for example, a male of seventeen may not be punished for having consensual sexual intercourse with a female of seventeen, but he may be sentenced to two years if he engages in deviate

206. PA. STAT. ANN. tit. 18, §§ 3122, 3123 (Supp. 1973) (quoted in notes 79 and 136 *supra*).

207. See text accompanying notes 201-02 *supra*.

208. Compare PA. STAT. ANN. tit. 18, §§ 3121-22 (Supp. 1973) (quoted in notes 32 and 79 *supra*), with PA. STAT. ANN. tit. 18, §§ 3123-24 (Supp. 1973) (quoted in notes 136 and 144 *supra*).

209. PA. STAT. ANN. tit. 18, § 3125 (Supp. 1973) (same as provision quoted in note 174 *supra*).

210. As noted previously, see note 186 *supra*, the legislature enacted the corruption of minors provision in two different chapters of the *Crimes Code*. In Chapter 31, Sexual Offenses, the maximum penalty authorized is two years; in Chapter 63, Minors, the maximum penalty is five years.

211. The symbol "X" denotes any age greater than the minimum at which a person is deemed capable of the commission of crime.

212. If the male is greater than eighteen years of age, he may theoretically be sentenced under either PA. STAT. ANN. tit. 18, § 3124 (Supp. 1973) (Voluntary Deviate Sexual Intercourse) or under PA. STAT. ANN. tit. 18, § 3125 (Supp. 1973) (Corruption of Minors). Both provisions authorize the same maximum term of imprisonment. But see note 210 *supra*.

sexual intercourse with her, despite the decreased risk of physical injury in the latter situation. However, if the male were eighteen and the female seventeen, then he may be sentenced to two years imprisonment for having consensual sexual intercourse with her despite the fact that the disparity in age is minimal. Further, if the male and female were both eighteen, he may not be punished.

The *P.B.A. Proposed Code* exhibits similar but less severe problems.

*P.B.A. Proposed Code*

*Scheme of Punishment for Consensual Sexual Relations  
with Minors—Sexual Intercourse*

Male's Age	Female's Age	Maximum Penalty
X <sup>213</sup>	Less than 15	20
19 and over	15 <sup>214</sup>	7
less than 19	15	0
X	16 and over	0 <sup>215</sup>

*Deviate Sexual Intercourse*

Actor's Age	Victim's Age	Maximum Penalty
X	Less than 15	10
X	15 and over <sup>216</sup>	1

*Seduction:* The *Crimes Code* does not contain a seduction provision, but leaves the prior seduction statute unrepealed. A number of considerations, however, favor the elimination of any criminal sanctions for seduction. First, a substantial body of present opinion no longer views sexual intercourse as a favor granted by the female in exchange for a promise of marriage from the male, but rather as a matter of mutual gratification.<sup>217</sup> As such, it can rarely be said that the female yields predominantly on account of the seducer's deception. Secondly, although deception with respect to

213. See note 211 *supra*.

214. The female must also be of good repute. *P.B.A. PROPOSED CODE* § 1204 (1971) (quoted in note 189 *supra*).

215. See note 205 *supra*.

216. The chart presumes *P.B.A. PROPOSED CODE* § 1203(c), Alternative A (1971), which is the provision that the *Crimes Code* subsequently adopted. PA. STAT. ANN. tit. 18, § 3124 (Supp. 1973) (quoted in note 144 *supra*).

217. MODEL PENAL CODE § 207.4, Comment at 256-57 (Tent. Draft No. 4, 1955).



property, i.e. property fraud, exhibits sufficient depravity and deviation from social norms so as to justify the imposition of criminal sanctions, deception in love may manifest significantly less offensive behavior because this type of deception is (1) less likely to deprive the victim of anything she really wanted to keep, (2) usually present to a certain degree in most relationships that involve emotions, and (3) difficult to distinguish from the situation in which an angry female testifies to innuendoes of promises.<sup>218</sup> Furthermore, in property fraud the value of the article transferred is usually misrepresented, whereas this is certainly not the case in seduction.<sup>219</sup> In light of these considerations concerning the real motivations of the female and the true nature of the male's act, it is submitted that it would have been sounder policy for the legislature to have repealed the seduction statute absolutely.

## VI. THE MEANING OF THE NEW JERSEY PROPOSED CODE— CORRUPTION OF MINORS AND SEDUCTION

### A. *Differences of the Existing New Jersey Law from the Former Law of Pennsylvania*

*Seduction:* New Jersey has two statutes dealing with seduction,<sup>220</sup> one with seduction of a single woman by a single man and the other with seduction of a single woman by a married man.<sup>221</sup> In the former, a male of any age may commit the offense with a female of any age. In the latter, the male must be greater than eighteen and the female less than twenty-one.<sup>222</sup> Pennsylvania law makes no such distinction. Both New Jersey statutes require (1) that the female be of good repute and (2) that the female become pregnant.<sup>223</sup> The first element has been interpreted in the same way as in Pennsylvania;<sup>224</sup> the second element is not required under the Pennsylvania statute.<sup>225</sup> The inclusion of this latter requirement has been the subject of some controversy.<sup>226</sup>

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218. *Id.*

219. *Id.* The American Law Institute concludes, however, that legislation prohibiting seduction may be justified for certain aggravated forms so that outraged parties who might resort to violence otherwise will have an available legal resource.

220. N.J. STAT. ANN. § 2A:142-1, 2 (1969).

221. It is submitted that there is little support now for the requirement that the female be single in view of the fact that divorce has become relatively easy.

222. N.J. STAT. ANN. § 2A:142-1, 2 (1969).

223. *Id.*

224. *E.g.*, *Foley v. State*, 59 N.J.L. 1, 35 A. 105 (Sup. Ct. 1896). The court said "[T]he crime consists . . . in the seduction of the woman, whether she is chaste or unchaste, provided she be chaste in public estimation." See note 184 and accompanying text *supra* for the Pennsylvania position.

225. PA. STAT. ANN. tit. 18, § 4510 (1963).

226. The following arguments have been advanced concerning the requirement of pregnancy:

With respect to seduction by an unmarried man, the New Jersey statute provides that if the male marries the female before sentence, the sentence will be suspended, and if he marries her after sentence, he will be discharged.<sup>227</sup> This, too, has been the subject of considerable controversy.<sup>228</sup> Both of the New Jersey statutes authorize a maximum penalty of seven years, whereas the Pennsylvania statute provides for a maximum of three years.<sup>229</sup>

*Corruption of Minors:* New Jersey has several statutes relating to the corruption of minors. First, sodomy with children under sixteen,<sup>230</sup> which is punishable presently by a maximum of thirty years, would be partially encompassed by the New Jersey proposal's corruption of minors provision<sup>231</sup> if the act were volun-

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(1) Pregnancy, and not the imposition on the female, is the real harm of the offense. Contra, to require pregnancy as an element is to discriminate between two equally guilty defendants on the basis of the accident of pregnancy;

(2) Physical corroboration is provided to the female's story by the pregnancy. Contra, pregnancy is of little value in determining the existence of the main issue of deception. Moreover, corroboration is independently required.

(3) Requiring pregnancy conforms the legal definition of the offense to the realities of prosecution, i.e. complaints are rarely filed unless pregnancy and failure to support occur. Contra, if seduction is only a tool to enforce support claims, it should be eliminated completely rather than defined to require pregnancy. See MODEL PENAL CODE § 207.4, Comment at 260-61 (Tent. Draft No. 4, 1955).

227. N.J. STAT. ANN. § 2A:142-2 (1969).

228. The following arguments have been advanced concerning the release of the defendant after marriage to the complainant:

(1) Marriage indicates the good faith of the male's promise. Contra, because the marriage need not antedate the prosecution, the marriage indicates neither good faith nor reformation of character, but only avoidance of jail.

(2) Even if the original promise were not made in good faith, society should not ruin an incipient marriage by jailing the husband. Contra, the marriage should not be encouraged because a marriage under threat of prosecution is most likely to work out badly.

(3) The seducer is given a penal incentive to marry. Contra, the impact of the penal incentive has not been proved and, anyway, the law should not provide an incentive for these kinds of marriages. See MODEL PENAL CODE § 207.4, Comment at 261-62 (Tent. Draft No. 4, 1955).

229. N.J. STAT. ANN. § 2A:142-1, 2 (1969); PA. STAT. ANN. tit. 18, § 4510 (1963).

230. N.J. STAT. ANN. § 2A:143-2 (1969).

231. N.J. PROPOSED CODE § 3C:14-3(a) (1971). This is identical to P.B.A. PROPOSED CODE § 1204(a) (1971) (quoted in note 189 *supra*) except that the New Jersey provision encompasses deviate sexual intercourse as well as sexual intercourse.

If the act were forcible or if the child were less than twelve years of age, then N.J. PROPOSED CODE § 2C:14-2(a) (1971) (Aggravated Sodomy) (quoted in note 164 *supra*) would apply.

tary. Secondly, carnal abuse of a female between the ages of twelve and sixteen (inclusive),<sup>232</sup> which is punishable by a maximum of fifteen years, would be included within corruption of minors if the act were consensual.<sup>233</sup> Finally, the New Jersey statute entitled Lewdness and Indecency,<sup>234</sup> which presently encompasses cunnilingus and fellatio committed with consenting minors, and provides for a maximum penalty of three years, would be included within Corruption of Minors.<sup>235</sup>

#### B. Comparative Analysis of the New Jersey Proposed Code—Corruption of Minors and Seduction

The New Jersey proposal eliminates all criminal sanctions for seduction and in this way is identical to the *Model Penal Code* and the *P.B.A. Proposed Code*.<sup>236</sup> The New Jersey proposal, however, differs somewhat from the P.B.A. proposal and to a much greater degree from the *Pennsylvania Crimes Code* with respect to its provisions concerning the corruption of minors. Whereas the P.B.A. proposal limited its corruption of minors provision to "sexual intercourse," the New Jersey proposal adopts the *Model Penal Code's* approach by treating both sexual and deviate sexual intercourse with minors between the ages of twelve and sixteen (inclusive) in the same provision.<sup>237</sup> This makes for far greater consistency in the overall scheme of punishment for consensual sexual relations with minors, as indicated in the chart below. Moreover, it can be seen that the New Jersey proposal's scheme corresponds directly with the tri-partite categorization according to the victim's age advanced by the *Model Penal Code*.<sup>238</sup> Also apparent from the chart is the extent to which the harsh existing penalties have been mitigated.

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232. N.J. STAT. ANN. § 2A:138-1 (1969).

233. N.J. PROPOSED CODE § 2C:14-3(a) (1971). If the act were forcible or if the female were less than twelve years of age, then N.J. PROPOSED CODE § 2C:14-1(a) (1971) (Aggravated Rape) (quoted in note 102 *supra*) would apply.

234. N.J. STAT. ANN. § 2A:115-1 (1969).

235. N.J. PROPOSED CODE § 2C:14-3(a) (1971). If the act were forcible or if the minor were less than twelve years of age, then N.J. PROPOSED CODE § 2C:14-2(a) (Aggravated Sodomy) (quoted in note 164 *supra*) would apply.

236. See text accompanying notes 217-19 *supra* for discussion of the rationale behind this decision. By eliminating seduction from the proposal, the N.J. PROPOSED CODE avoids the peculiar problems of the existing New Jersey law. See notes 226-28 and accompanying text *supra*.

237. MODEL PENAL CODE § 213.3 (Proposed Official Draft, 1962); N.J. PROPOSED CODE § 2C:14-3 (1971). The PENNSYLVANIA CRIMES CODE, however, treats deviate sexual intercourse differently from sexual intercourse due to its retention of criminal sanctions against voluntary deviate sexual intercourse. PA. STAT. ANN. tit. 18, § 3124 (Supp. 1973) (quoted in note 144 *supra*).

238. See text accompanying notes 201-02 *supra*.

*New Jersey Proposed Code*  
*Scheme of Punishment for Consensual Sexual Relations With*  
*Minors—Sexual or Deviate Sexual Intercourse*

Actor's Age	Victim's Age	Maximum Penalty
16 and over <sup>239</sup>	less than 12	20
Victim's age plus 4 (but not less than 16)	12 to 15 (incl.)	5
16 and over	16 and over	0 <sup>240</sup>

The New Jersey proposal is in opposition to both the *P.B.A. Proposed Code* and the *Model Penal Code* in eliminating the requirement in this section that the victim not have previously engaged promiscuously in sexual relations.<sup>241</sup> It is submitted that this is a deficiency in the New Jersey proposal (1) because the gist of this offense is the protection of innocent victims from corruption and (2) because of the distinct possibility, when the victims are sufficiently advanced in age so as to be physically capable of sexual relations and have had previous sexual experience, that they are the instigators rather than the victims.

Several other changes would be made to the existing New Jersey law if the proposal is adopted by the legislature. The first subsection of the provision<sup>242</sup> would change the present law by requiring a four year disparity in the ages of the participants. The second subsection<sup>243</sup> has no corresponding provision in the existing law. The third subsection<sup>244</sup> would expand the scope of a present New Jersey statute which encompasses only those victims who are in the custody of a mental institution or a home for the feeble-minded.<sup>245</sup>

VII. THE MEANING OF THE PENNSYLVANIA CRIMES CODE—  
SEXUAL ASSAULT

A. *Former Sexual Assault Law in Pennsylvania*

In general, neither the common law nor American legislatures

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239. N.J. PROPOSED CODE § 2C:4-10(a) (1971) provides for treatment of juveniles in essentially the same manner as the MODEL PENAL CODE. See note 203 *supra*.

240. See note 205 *supra*.

241. P.B.A. PROPOSED CODE § 1207(c) (1971); MODEL PENAL CODE § 213.6(3) (Proposed Official Draft, 1962). The N.J. PROPOSED CODE has no corresponding section.

242. N.J. PROPOSED CODE § 2C:14-3(a)(1) (1971) (same as provision quoted in note 189 *supra*).

243. *Id.* § 2C:14-3(a)(2).

244. *Id.* § 2C:14-3(a)(3).

245. N.J. STAT. ANN. § 2A:138-2 (1969).

have made special provisions for indecent assault, but instead have treated it as a variety of ordinary assault and battery.<sup>246</sup> Before the enactment of the *Crimes Code*, Pennsylvania had devoted three statutes to this general area.<sup>247</sup> None of them, however, was specifically addressed to the type of harm at which the *Crimes Code* is directed. Whereas in the new law the shame or outrage resulting in the victim is of primary concern, in the former statutes the threat of physical injury was the gravamen of the offense.

### B. *Sexual Assault Under the Pennsylvania Crimes Code*

The *Crimes Code* adopts the view that indecent assault should be accorded specialized treatment as a sexual offense and not dealt with simply as another variety of common assault. The rationale is threefold: (1) special danger of psychological and sociological harm is present in sexual assault as in the other sexual offenses, (2) society's concern is focused on the emotional violation of the victim rather than on her physical violation as is the case with other assaults, and (3) it is desirable to consolidate all offenses which are predicated upon a sexual imposition within the same section of the *Code*.<sup>248</sup>

The behavior prohibited by the sexual assault provision<sup>249</sup> is "indecent contact" which is defined as "any touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire in either person."<sup>250</sup> Thus this provision deals with less serious acts of sexual aggression not amounting to penetration. It encompasses homosexual as well as heterosexual behavior, but does not include truly consensual contacts nor any contacts with minors.

All of the subsections of the indecent assault provision, with the sole exception of the first, are analogous to subsections discussed previously in relation to the other sexual offenses. The language used in this section of the *Crimes Code* is derived from the rape, deviate sexual intercourse, and corruption of minors provisions of the *P.B.A. Proposed Code*.<sup>251</sup> This is of course the same

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246. MODEL PENAL CODE § 207.6, Comment at 292 (Tent. Draft No. 4, 1955).

247. Act of May 12, 1966, No. 1, § 1, [1966] Pa. Laws 84 (repealed 1972) (entitled Assault with Intent to Ravish); Act of June 24, 1939, No. 375, § 502, [1939] Pa. Laws 872 (repealed 1972) (entitled Assault and Solicitation to Commit Sodomy); Act of July 25, 1961, No. 366, [1961] Pa. Laws 848 (repealed 1972) (entitled Corruption of Morals).

248. MODEL PENAL CODE § 207.6, Comment at 292 (Tent. Draft No. 4, 1955).

249. PA. STAT. ANN. tit. 18, § 3126 (Supp. 1973).

250. *Id.* § 3101.

251. PA. STAT. ANN. tit. 18, § 3126 (Supp. 1973) provides:

A person who has indecent contact with another not his spouse, or causes such other to have indecent contact with him is guilty of indecent assault, a misdemeanor of the second degree, if:

language that was explicitly rejected by the legislature when it enacted the corresponding provisions of the *Crimes Code*. Apparently, the legislature's justification for this seemingly inconsistent position is that in this provision these subsections pertain to a less serious type of sexual aggression than they do in the provisions from which they were borrowed, and thus may be appropriate here yet inappropriate in these other sections.

The new law's indecent assault provision, however, does not include all of the impositions that are enumerated in the other sex crimes. Those that relate to force or threats of force are omitted and instead dealt with as ordinary assaults.<sup>252</sup> Moreover, in contrast with the P.B.A. proposal, the *Crimes Code* omits from its indecent assault provision all subsections pertaining to sexual contact with minors.<sup>253</sup> By so doing, these situations are relegated to the new law's corruption of minors provision<sup>254</sup> which as mentioned previously,<sup>255</sup> requires no meaningful age disparity and thus may result in penalizing normal adolescent sex play, not intended by either participant to be carried as far as intercourse. Fur-

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(1) he knows that the contact is offensive to the other person;

(2) he knows that the other person suffers from a mental disease or defect which renders him or her incapable of appraising the nature of his or her conduct;

(3) he knows that the other person is unaware that an indecent contact is being committed;

(4) he has substantially impaired the other person's power to appraise or control his or her conduct, by administering or employing without the knowledge of the other drugs, intoxicants or other means for the purpose of preventing resistance; or

(5) the other person is in custody of law or detained in a hospital or other institution and the actor has supervisory or disciplinary authority over him.

The language of the second subsection is from subsection (5) of Rape and subsection (2) of Deviate Sexual Intercourse—By Other Imposition of the P.B.A. proposal. See, e.g., P.B.A. PROPOSED CODE § 1202(a) (5) (1971) (quoted in note 39 *supra*). The language of the third subsection is from subsection (2) of Gross Sexual Imposition and subsection (3) of Deviate Sexual Intercourse—By Other Imposition. See, e.g., P.B.A. PROPOSED CODE § 1202(b) (2) (1971) (quoted in note 46 *supra*). The fourth subsection is from subsection (2) of Rape and subsection (2) of Deviate Sexual Intercourse—By Force or Its Equivalent. See, e.g., P.B.A. PROPOSED CODE § 1202(a) (2) (1971) (quoted in note 39 *supra*). The fifth subsection is from subsection (3) of Corruption of Minors. P.B.A. PROPOSED CODE § 1204(a) (3) (1971) (quoted in note 189 *supra*).

252. See PA. STAT. ANN. tit. 18, §§ 2701-02 (Supp. 1973) (Simple and Aggravated Assault).

253. PA. STAT. ANN. tit. 18, § 3126 (Supp. 1973) (quoted in note 251 *supra*).

254. PA. STAT. ANN. tit. 18, § 3125 (Supp. 1973) (same as provision quoted in note 174 *supra*).

255. See note 188 and accompanying text *supra*.

thermore, in contrast with its own rape and involuntary deviate sexual intercourse sections, the *Crimes Code* makes no provision under Indecent Assault for situations in which the victim is unconscious. The language of the third subsection<sup>256</sup> would have to be stretched beyond its intendment in order to dispose of these situations under the present formulation of the provision, since this clause was drafted to reach situations of fraud in which the victim is *conscious* but unaware.

Another difficulty that may be encountered with this provision of the new law arises in relation to the first subsection which provides that a person who has indecent contact with another not his spouse, or causes such other to have indecent contact with him, is guilty of indecent assault if "he knows that the contact is offensive to the other person."<sup>257</sup> The difficulty is that the quoted language may not furnish a sufficiently clear standard of conduct. The words seem to imply a subjective standard such that if the actor honestly believes that the contact is not offensive, despite the fact that a reasonable man would have certainly known that it was, he has a defense to a prosecution under this provision.

Indecent Assault is made a misdemeanor of the second degree which is punishable by a maximum sentence of two years imprisonment.<sup>258</sup> It is a defense to prosecution under the fifth subsection of this provision for the actor to prove by a preponderance of the evidence that the victim had previously engaged promiscuously in sexual relations with others.<sup>259</sup>

In sum, it is submitted that although the provision suffers from a number of specific difficulties, the general formulation of this section is sound and represents an improvement over the prior law.

## VIII. THE MEANING OF THE NEW JERSEY PROPOSED CODE— SEXUAL ASSAULT

### A. *Present Sexual Assault Law in New Jersey*

New Jersey has two statutes dealing with the general subject of sexual assault.<sup>260</sup> As was the case in Pennsylvania, however, neither of these specifically addresses itself to the kind of harm at which the New Jersey proposal is directed. The gravamen of these statutes is bodily injury, not shame as in the New Jersey

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256. PA. STAT. ANN. tit. 18, § 3126 (Supp. 1973) (quoted in note 251 *supra*).

257. PA. STAT. ANN. tit. 18, § 3126(1) (Supp. 1973).

258. *Id.* §§ 1104 and 3126.

259. *Id.* § 3104.

260. N.J. STAT. ANN. § 2A:90-2 (1969), entitled Assault with Intent to . . . Commit . . . Rape, . . ., Sodomy, or Carnal Abuse; N.J. STAT. ANN. § 2A:138-1 (1969), entitled Rape and Carnal Abuse.

The latter statute was previously discussed in connection with rape, *see* text accompanying notes 89-101 *supra*. It is also applicable here, however, because it does not require penetration.

proposal, and hence the penalties imposed under the present law are much more harsh than those imposed under the proposal. The New Jersey statute entitled Lewdness and Indecency, however, by authorizing that "any person who in private commits an act of lewdness or carnal indecency with another . . ." be sentenced to a maximum of three years imprisonment,<sup>261</sup> protects an interest somewhat more closely related to the interest the New Jersey proposal protects than to the interest the other statutes protect.

**B. Comparative Analysis of the New Jersey Proposed Code—Sexual Assault**

For inclusion within its sexual assault provision, the New Jersey proposal not only borrows the same five subsections from its other sex crimes provisions as the *Pennsylvania Crimes Code* borrowed from the other provisions of the P.B.A. proposal,<sup>262</sup> but in addition it borrows the language of three subsections which the *Crimes Code* did not include within its indecent assault provision.<sup>263</sup> These additional subsections deal with sexual contacts with victims (1) under the age of twelve, (2) under the age of sixteen when the actor is at least four years older than the victim,

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261. N.J. STAT. ANN. § 2A:115-1 (1969).

262. See note 251 and accompanying text *supra*.

263. N.J. PROPOSED CODE § 2C:14-4 (1971):

A person who has sexual contact with another not his spouse, or causes such other to have sexual contact is guilty of sexual assault, if:

a. he knows that the contact is offensive to the other person;

or

b. he knows that the other person suffers from a mental disease or defect which renders him or her incapable of appraising the nature of his or her conduct; or

c. he knows that the other person is unaware that a sexual contact is being committed; or

d. the other person is less than twelve years old; or

e. he has substantially impaired the other person's power to appraise or control his or her conduct, by administering or employing without the other's knowledge drugs, intoxicants or other means for the purpose of preventing resistance; or

f. the other person is less than sixteen years old and the actor is at least four years older than the other person; or

g. the other person is less than twenty-one years old and the actor is his guardian or otherwise responsible for general supervision of his welfare; or

h. the other person is in custody of law or detained in a hospital or other institution and the actor has supervisory or disciplinary authority over him.

Sexual assault under Subsection d is a crime of the third degree. Sexual assault under Subsections e and f is a crime of the fourth degree. Otherwise, it is a disorderly persons offense.

Sexual contact is any touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire.



and (3) under the age of twenty-one when the actor is responsible for the victim's general supervision or welfare.<sup>264</sup>

The only other significant difference between the *New Jersey Proposed Code* and the *Pennsylvania Crimes Code* in this area lies in the graduation of penalties within the provision. Whereas the *Pennsylvania Crimes Code* follows the *Model Penal Code* in designating a single penalty regardless of which subsection is violated,<sup>265</sup> the New Jersey proposal authorizes more severe penalties for violation of the clauses concerned with sexual contact with minors, and for violation of the clause in which the actor plays an active and substantial part in producing the victim's impaired condition by administering drugs or intoxicants without the victim's knowledge for the purpose of preventing her resistance.<sup>266</sup> The maximum penalty specified in the New Jersey proposal for a violation of its subsection dealing with victims below the age of twelve is five years, which is significantly greater than the penalty imposed under the corresponding section of the *Pennsylvania Crimes Code*.<sup>267</sup> It is submitted, however, that a more severe punishment may be warranted because of the significantly younger victims to which the section applies.<sup>268</sup> The maximum penalty authorized for violation of the subsections dealing with victims under sixteen and the "active impairment" situation is eighteen months.<sup>269</sup> Again it is submitted that this small increase may be warranted by the fact that in the former case the provision deals with younger victims, and in the latter case the defendant acts deliberately and purposefully to take advantage of the victim. If the offense does not fall within these three subsections, a maximum term of six months is authorized.<sup>270</sup>

Finally, the *New Jersey Proposed Code* differs from the *Pennsylvania Crimes Code* in its treatment of defendants when a sexually promiscuous complainant is involved. Whereas in the *Pennsylvania Crimes Code* the fact that the victim has previously been sexually promiscuous provides a defense to prosecutions under its "custody" subsection,<sup>271</sup> in the New Jersey proposal it does not. It is submitted that the Pennsylvania position is the more well-reasoned of the two in that "[a] young person who is accustomed to

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264. N.J. PROPOSED CODE § 2C:14-4(c), (f), (g) (1971).

265. PA. STAT. ANN. tit. 18, § 3126 (Supp. 1973); MODEL PENAL CODE § 213.4 (Proposed Official Draft, 1962).

266. N.J. PROPOSED CODE § 2C:14-4 (1971) (quoted in note 263 *supra*).

267. Compare N.J. PROPOSED CODE §§ 2C:14-4, 43-6(a)(3) (1971), with PA. STAT. ANN. tit. 18, §§ 1104(2), 3125 (Supp. 1973). But see note 186 *supra*.

268. The New Jersey provision applies to victims under the age of twelve, whereas the Pennsylvania provision deals with victims under the age of eighteen.

269. N.J. PROPOSED CODE § 2C:14-4(e), (f) (1971) (quoted in note 263 *supra*) and N.J. PROPOSED CODE § 2C:43-6(a)(4) (1971).

270. N.J. PROPOSED CODE §§ 2C:14-4, 43-8 (1971).

271. PA. STAT. ANN. tit. 18, § 3126(5) (Supp. 1973) (quoted in note 251 *supra*) and PA. STAT. ANN. tit. 18, § 3104 (Supp. 1973).

sexual activity (1) would suffer little or no physical harm from consensual sexual contact and (2) might well be the seducer rather than the seduced."<sup>272</sup>

### CONCLUSION

As has been seen, in many areas the former Pennsylvania law was, and the present New Jersey law is, founded upon outdated moral convictions. Additionally, the old law of Pennsylvania generally failed, as does the existing New Jersey law, to distinguish between varying degrees of criminality of the offender's conduct and tended to provide penalties that were overly severe. Furthermore, the law of Pennsylvania was, and the New Jersey law is, vague in many respects.

In contrast, the *P.B.A. Proposed Code* and the *N.J. Proposed Code* reflect society's changed moral attitude. The drastic mitigation of penalties for voluntary deviate sexual intercourse,<sup>273</sup> and the complete elimination of criminal sanctions against seduction in the N.J. proposal,<sup>274</sup> are but two salient examples. Moreover, these proposals have generally established more equitable systems for graduating punishment according to the gravity of the offender's behavior. The New Jersey proposal's scheme for punishment of those convicted of consensual sex crimes with minors is particularly noteworthy in this respect.<sup>275</sup> Furthermore, these proposals for the most part create a logical, cohesive, clear, and comprehensive body of substantive law, which is a fundamental requirement of any efficient legal system.

This is not to say, however, that these proposals are without flaws. On the contrary, there are several defects to be found within them. Some have been incorporated directly from the law in force when they were drafted, and some have their origin within the proposals themselves. But whatever their source, most of the deficiencies in the *N.J. Proposed Code* and the *P.B.A. Proposed Code* may be easily remedied.

The *Pennsylvania Crimes Code*, however, presents a different situation. In almost every particular, the *Crimes Code* has taken a relatively progressive position from the *P.B.A. proposal* and

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272. MODEL PENAL CODE § 207.6, Comment at 295 (Tent. Draft No. 4, 1955).

273. The *Pennsylvania Crimes Code* greatly reduces the penalty, see notes 145-46 and accompanying text *supra*; the New Jersey proposal provides for no punishment at all, see notes 166-67 and accompanying text *supra*.

274. See note 236 and accompanying text *supra*.

275. See notes 237-40 and accompanying text *supra*.

through successive amendments nullified its effect. With respect to rape, for example, the *Crimes Code* makes no provision to encompass impositions that are not serious enough to include in Rape, but which are nevertheless sufficiently offensive to be criminal.<sup>276</sup> Likewise, the *Crimes Code* rejects the P.B.A. proposal's "control" standard in favor of adoption of the former law's unsatisfactory "legal consent" standard.<sup>277</sup> Similarly, whereas the P.B.A. proposal specifically provided for situations where the victim is drugged or intoxicated by the actor and for situations of fraudulently obtained consent, the *Crimes Code* makes no provision for such conduct.<sup>278</sup>

With respect to statutory rape, the *Crimes Code's* age of consent is too high and its penalties too low.<sup>279</sup> Indeed, the *Crimes Code's* entire scheme of punishment of defendants convicted of consensual sex crimes with minors is ill-conceived.<sup>280</sup> This difficulty is compounded by the re-enactment by the *Crimes Code* of the prior law's corruption of minors provision which requires no meaningful age disparity between victim and actor and thus is ill-suited for integration within its scheme of punishment based on the victim's age.<sup>281</sup> Furthermore, in both its rape and involuntary deviate sexual intercourse provisions, the *Crimes Code* fails to vary the severity of the penalties it imposes in accordance with the gravity of the actor's conduct, in direct contrast with the P.B.A. proposal.<sup>282</sup> Finally, the *Crimes Code* leaves unrepealed the prior law's seduction statute and retains criminal sanctions against deviate sexual intercourse between consenting adults, despited the cogent arguments that have been advanced in opposition to such provisions.<sup>283</sup>

Of course, the *Crimes Code* does effect some constructive changes to the former law, changes that were sorely needed to correct the inconsistencies and injustices ingrained in the old law. Nevertheless, it is submitted, that on balance the deficiencies in the *Crimes Code*, many of which are simply re-enactments of the former law in more modern and precise language, far outweigh the improvements. Thus, whereas the N.J. Proposed Code takes a giant step forward toward the establishment of a more equitable and efficient legal system, the *Pennsylvania Crimes Code* merely sidesteps the issues and as a result fails to achieve its goals.

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276. See notes 46-48 and accompanying text *supra*.

277. See notes 51-54 and 58-59 and accompanying text *supra*.

278. See notes 57-58 and text accompanying and immediately preceding them *supra*. See also notes 63-67 and accompanying text *supra*.

279. See text accompanying notes 79-88 *supra*.

280. See notes 206-12 and accompanying text *supra*.

281. See notes 174 and 209 and accompanying text *supra*.

282. See notes 72-78 and 138-43 and accompanying text *supra*.

283. See notes 144-52, 177, and 217-19 and accompanying text *supra*.